

(23.847)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 696.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
NATIONAL SURETY COMPANY, AND AMERICAN SURETY
COMPANY OF NEW YORK, PLAINTIFFS IN ERROR,

vs.

IVOLUE B. WEST.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Supreme Court of Oklahoma, in Oklahoma City, Oklahoma, this 4th day of September, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

Cost of Transcript Paid by Plaintiff in Error, \$134.40.

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In the Supreme Court of Oklahoma.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, NATIONAL SURETY Company, and American Surety Company of New York, Plaintiffs in Error,

vs.

IVOLUE B. WEST, Defendant in Error.

Præcipe for Record.

To the Clerk of the Supreme Court of the State of Oklahoma:

You are requested to at once prepare a complete copy of the record in the above entitled and numbered case, including copies of all papers filed and all proceedings had in the Supreme Court of the State of Oklahoma, in compliance with the writ of error from the United States Supreme Court heretofore filed herein.

JOSEPH M. BRYSON,
CLIFFORD L. JACKSON,
WILLIAM R. ALLEN,
MAURICE D. GREEN,
Attorneys for Plaintiffs in Error.

STATE OF KANSAS,
Labette County, ss:

J. D. Peters, of lawful age, being first duly sworn on oath deposes and says:

That he is personally acquainted with the Defendant in Error in

the above case; that on August 19, 1913, he served the above and foregoing Præcipe for Record by delivering a true and correct copy of the same to Ivolue B. West, defendant in error in the above entitled action.

J. D. PETERS.

Subscribed in my presence and sworn to before me this 19th day of August, 1913.

[Seal of C. S. Clark, Notary Public, Labette County, Kans.]

C. S. CLARK,
Notary Public.

My commission expires Feb. 14, 1914.

2 I received the attached præcipe for record on the 26th day of August, 1913, at 11 o'clock a. m., and served the same by delivering to S. Grant Harris in person, attorney of record for Ivolue B. West, the defendant in error in the case of Missouri, Kansas & Texas Railway Company et al., Plaintiffs in error, vs. Ivolue B. West, Defendant in error, a true and correct copy of such præcipe for record, all of which was done on the 26th day of August, 1913, at 11 o'clock a. m., in the City of Saint Paul in the — District of the State of Minnesota.

WM. H. GRIMSHAW,
United States Marshal for the — District,
State of Minnesota,
By S. J. PICHA, Deputy.

3 [Endorsed:] 4381. No. 1928. In the Supreme Court of Oklahoma. Missouri, Kansas & Texas Railway Company, et al., Plaintiffs in Error, vs. Ivolue B. West, Defendant in Error. Præcipe for record. Filed Sep. 4, 1913. W. H. L. Campbell, Clerk.

4 In the Supreme Court of the United States.

No. —.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, NATIONAL SURETY Company, and American Surety Company of New York, Plaintiffs in Error,

VS.
IVOLUE B. WEST, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed by and between the various parties to this case, acting through their respective counsel, that a citation was duly and properly issued and signed in this case, and that said citation was duly and properly served upon the defendant in error, Ivolue B. West, in person, at the town of Parsons, in the County of Labette, State of Kansas, on the 19th day of August, 1913,

and that said citation was further duly and properly served upon S. Grant Harris, Esquire, one of the attorneys of record for said defendant in error, Ivolue B. West, in this case at Saint Paul, Minnesota, on the 26th day of August, 1913, and that through error at the time the United States Marshal for the District of Minnesota made service of said citation on said S. Grant Harris, as aforesaid, the original citation, with proof of service thereof upon the defendant in error, in person, was delivered by said Marshal to said S. Grant Harris, Esquire, and that the same has been, through error, sent by the said S. Grant Harris, Esquire, to C. H. Taylor, Esquire, who is also one of the attorneys of record for the defendant in error, Ivolue B. West, in this case; that said original citation was so sent by said Harris to said Taylor to the latter's residence at Long Beach, California, and that it will be impossible to secure the return of said citation in time for the same to be attached to the record and forwarded to the United States Supreme Court in this case, and this stipulation shall be deemed and taken as a waiver of the appearance in this record and the filing in this Court of the original citation and the returns of service thereupon.

JOSEPH M. BRYSON,
CLIFFORD L. JACKSON,
WILLIAM R. ALLEN, AND
MAURICE D. GREEN,
Attorneys for Plaintiff in Error.
C. H. TAYLOR,
S. GRANT HARRIS, AND
BENJ. MARTIN, JR.,
Attorneys for Defendant in Error.

5 [Endorsed:] In the Supreme Court of the United States.
No. —. Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, Plaintiffs in Error, vs. Ivolue B. West, Defendant in Error. Stipulation. Filed Sep. 4, 1913. W. H. L. Campbell, Clerk. . .

6 In the Supreme Court of the State of Oklahoma.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, NATIONAL SURETY Company, and American Surety Company of New York, Plaintiffs in Error,

vs.

IVOLUE B. WEST, Defendant in Error.

Petition for Writ of Error.

Come now the above named Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, Plaintiffs in Error, and say: that on the 9th day of April, 1910, a judgment was rendered in the District Court

within and for the Third Judicial District, Muskogee County, State of Oklahoma, against the Plaintiff in Error, Missouri, Kansas & Texas Railway Company, for Fifteen Thousand (\$15,000.00) Dollars in favor of the Defendant in Error, Ivolue B. West; that pursuant to the civil statutes of the State of Oklahoma said cause was appeared to the Supreme Court of the State of Oklahoma where, on the 20 day of June, 1912, this Court handed down its opinion affirming the judgment of the trial court; that thereafter, pursuant to the civil statutes of the State of Oklahoma, and on the 26 day of June, 1912, a petition for re-hearing was filed, presented, considered, and on the 4 day of February, 1913, granted by this Court and thereafter, and on the 6 day of August, 1913, this Court handed down its opinion on re-hearing affirming the judgment of the trial court, which judgment thereupon became final; that the Supreme Court of the State of Oklahoma is the highest court in said State in which a decision in this action could be had; that these plaintiffs in error, the said Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, were and are aggrieved in that, in said judgment and proceedings had

7 prior thereto in this case, certain errors were committed to their prejudice; that this is an action brought by the defendant in error, Ivolue B. West, as the widow of William B. West, deceased, for damages for his death alleged to have been caused through the negligence of the plaintiff in error, Missouri, Kansas & Texas Railway Company and its servants; that this plaintiff in error, Missouri, Kansas & Texas Railway Company is, and was, at the time of the injuries resulting in the death of the said William B. West, a common carrier by railroad, engaged in interstate commerce, and the deceased, William B. West, was, at the time of the injuries resulting in his death, employed by the plaintiff in error, Railway Company, in such commerce, being employed as baggageman, and was, at the time, handling interstate baggage upon a train of the plaintiff in error, Railway Company, which was at the time engaged in moving interstate traffic; and plaintiffs in error, therefore, contended, and still contend, in said action that defendant in error had no right to maintain this suit, but that same could only be maintained by the personal representatives of the deceased, as contemplated by the Act of Congress approved April 22, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," and that by this action there is, therefore, drawn in question the construction of said statute, and the decision of this Court is against the right claimed by these plaintiffs in error to insist that said action should have been so brought, and is, as it believes, contrary to the said statute of the United States relating to actions for the death of persons while in the employ of common carriers by railroad and engaged in commerce between the several states, as contemplated by said Act; that in said action rights, privileges and immunities were claimed by your petitioners under the Constitution and Statutes of the United States, and under authority exercised under the United States, and the decision of the said Supreme Court of the State of Oklahoma was against the rights,

privileges and immunities especially set up and claimed under said Constitution, Statutes and authority; all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, said plaintiffs in error pray that a writ of error may issue to the Supreme Court of the State of Oklahoma for the correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

JOSEPH M. BRYSON,
CLIFFORD L. JACKSON,
WILLIAM R. ALLEN,
MAURICE D. GREEN,
Attorneys for Plaintiffs in Error.

BRITTON & GRAY,
Of Counsel.

Allowed by:
SAMUEL W. HAYES,
*Chief Justice of the Supreme Court of
the State of Oklahoma.*

[Seal Supreme Court, State of Oklahoma.]

Attest:
W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

[Endorsed:] No. 1928. In the Supreme Court of the State of Oklahoma. Missouri, Kansas & Texas Railway Company, Plaintiff in Error, vs. Ivolue B. West, Defendant in Error. Petition for Writ of Error. Filed Aug. 11, 1913. W. H. L. Campbell, Clerk.

In the Supreme Court of the United States.

No. —.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, NATIONAL SURETY COMPANY, and AMERICAN SURETY COMPANY OF NEW YORK,
Plaintiffs in Error,

v.

IVOLUE B. WEST, Defendant in Error.

Assignment of Errors.

Come now the Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, plaintiffs in error in the above entitled cause, and aver and show that in the foregoing record and proceedings in said cause there is manifest error in the action and rulings of the District Court, within and for the Third Judicial District, Muskogee County,

State of Oklahoma, as well as in the action, rulings and opinion of the Supreme Court of the State of Oklahoma, in this, to-wit:

I.

The trial court erred in overruling the objection of the plaintiff in error, Missouri, Kansas & Texas Railway Company, to the introduction of any evidence in the case and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

II.

The trial court erred in refusing to admit in evidence the application for a situation of William B. West with the American Express Company, which application contained the accident release executed by the said William B. West, the benefits of which inured to the plaintiff in error, Missouri, Kansas & Texas Railway Company. Said application for situation and accident release executed by the said William B. West being marked "Defendant's Exhibit A," and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

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III.

The trial court erred in refusing to admit in evidence the application for a situation of William B. West with the American Express Company, which application contained the accident release executed by the said William B. West, the benefits of which inured to the plaintiff in error, Missouri, Kansas & Texas Railway Company. Said application for situation and accident release being marked "Defendant's Exhibit B," and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

IV.

The trial court erred in refusing to admit in evidence the application for a situation of William B. West, with the American Express Company, which application contained the accident release executed by the said William B. West, the benefits of which inured to the plaintiff in error, Missouri, Kansas & Texas Railway Company. Said application for situation and accident release being marked "Defendant's Exhibit C," and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

V.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

"(1) The court instructs the jury to find the issues in favor of the defendant."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

VI.

The trial court erred in instructing the jury as follows, to-wit:

(1) "You are instructed that this action is brought by the plaintiff as the widow of William B. West, for the benefit of herself as such widow and of the minor children of herself and of said William B. West, deceased, for the alleged negligent killing of her husband while he was running upon one of the defendant's trains as an express messenger in the employ of the American Express Company.

Plaintiff alleges that at and prior to the time of the death of said William B. West, he was employed by the American Express Company as a messenger, upon the express cars operated by the defendant company over its line of railroad between Parsons, Kansas, through the State of Oklahoma to points beyond in the State of Texas.

12 That in addition to his duties as express messenger said West was also engaged in handling passenger baggage upon the express cars of the defendant company. That on May 15, 1908, at about 12 o'clock noon, of said day, said William B. West, in the course of his employment, was riding in one of the express cars of the defendant company, then being operated by defendant over its railroad in a southerly direction, through the state of Oklahoma, upon its train known as the 'Katy Flyer'; That when said train reached a short distance south of the Arkansas river between the stations of Verdard and Muskogee, said train, through gross carelessness and negligence upon the part of the railroad company, and while said train was running at a high and dangerous rate of speed, caused and allowed to collide in a head-on collision with a locomotive and freight train, also owned operated and maintained by said defendant company and which freight train was also through the gross carelessness and negligence of said defendant company being run and operated by said defendant company upon the same track, in a northerly direction, at a high and dangerous rate of speed; and that the said William B. West was by said collision and by the gross carelessness and negligence on the part of the defendant and without any fault or neglect upon his part was then and there caused to sustain and receive personal injuries which resulted in his immediate death. Plaintiff brings suit in the sum of \$50,000.00 for said killing.

The defendant has filed an answer, which after denying each and every material allegation in plaintiff's petition, avers that if the said William B. West was injured and killed at the time, place, and in the manner alleged, his death was not due to any negligence on the part of the defendant, or any of its servants, agents, or employes, but was due solely to the negligence on the part of the said William B. West. Defendant further alleges in its answer that the defendant, before entering into the service of this company had executed two certain contracts to the American Express Company by which claim for damages for injuries were waived and released and in which contract he agreed to release any railroad on which he might be working at the time of any injury, and that the plaintiff is now barred from maintaining this action."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

VII.

The trial court erred in instructing the jury as follows, to-wit:

(2) "You are further instructed that the jury are the sole judges of the weight of the testimony and credibility of the witnesses, but the law of the case is that which is given to you by the court in these instructions, and you are to be governed by no other law. In determining the weight of the testimony and credibility of the witnesses, you have the right to look to each witness as he conducted himself while upon the witness stand, to his fairness or lack of fairness, to his intelligence or his incapacity, as the same appeared to you, to his interest in the case, if any, and you have the right to look to each and every surrounding circumstance that appears in the testimony. If there is a conflict between the different parts of the testimony of any witness, it is your duty to reconcile the same, if this can be done, upon the theory that each witness has spoken the truth; but if this cannot be done then you may disregard
13 any part of the testimony of any witness, or all of his testimony, as you may see fit under the surrounding facts and evidence in the case. If you believe from the evidence that any witness has wilfully testified falsely to any fact material to the issue in this case, then you are at liberty to disregard any part or the whole of the testimony of such witness."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

VIII.

The trial court erred in instructing the jury as follows, to-wit:

(3) "The burden is upon the plaintiff to sustain her contention by a preponderance of the testimony. By this is meant the greater weight of the testimony, and not necessarily the number of witnesses testifying upon the one side or the other."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

IX.

The trial court erred in instructing the jury as follows, to-wit:

(4) "You are instructed that it is the duty of a railway company to so conduct, maintain and run its trains used in its business in such a manner as to prevent injury to persons riding on said trains."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

X.

The trial court erred in instructing the jury as follows, to-wit:

(4½) "By 'ordinary care' as that term is used in these instructions, is meant that degree of care which a person of reasonable prudence and caution would likely use and exercise under the same or similar circumstances and conditions, and a failure to use such care is negligence on the part of the person or corporation guilty of such failure. That is to say; negligence is the failure to do or perform some act or the doing of some act which, from the nature of the act and under the circumstances, may result in injury or damage to the person or property of others, and which a person of reasonable prudence would or would not do, as the case may be, under the same or similar circumstances, and the rule here stated, applies equally to persons and corporations, the latter, that is corporations being chargeable with the negligence, if any, committed by their officers, agents and employes in the discharge of their duty as such."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

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XI.

The trial court erred in instructing the jury as follows, to-wit:

(5) "Now bearing in mind these instructions and applying them carefully to the evidence before you, if you believe and find from a preponderance of the testimony that on or about the 15th day of May, 1908, in the County of Muskogee, William B. West was personally injured by being in a wreck caused by a collision between the 'Katy Flyer' and one of defendant's freight trains on its line of railroad south of the Arkansas River bridge, and you further find that such injury was the direct or proximate result of the negligence of the defendant, its agents, officers, or employes to properly conduct and run its trains on said railroad track; that is if you so find and believe that the injuries sustained by William B. West was the direct or proximate result of the failure of defendant, its officers, agents or employes to exercise that degree of diligence and care to prevent injury to others as a person of ordinary caution and prudence would likely have used under the same or similar circumstances, and you further find that such injury caused the death of the said William B. West, then it will be your duty to return a verdict in favor of the plaintiff herein for such sum, as, in your judgment, the evidence shows her to be entitled to under other instructions given you in this case."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XII.

The trial court erred in instructing the jury as follows, to-wit:

(6) "If you find for the plaintiff in this case, then in assessing

the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health and bodily qualifications, during what probably would have been his lifetime if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XIII.

The trial court erred in instructing the jury as follows, to-wit:

(7) "Nine of the jury concurring is sufficient to to return a verdict for plaintiff or defendant and if the verdict is rendered by nine or more, but by less than the whole number of jurors, then the jurors who concur in the verdict must sign their names thereto. If the verdict is concurred in by the entire jury, then you will select some one of your number foreman and have him sign the verdict as such foreman and return it into court."

15 And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XIV.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

(2) "If you find from the evidence in this case that the deceased, W. B. West, was not an employé of the defendant, then the defendant would not be liable unless you should further find that the defendant was guilty of gross negligence and that as a result of such negligence the deceased was killed."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XV.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

(3) "If you find from the evidence in this cause that the said W. B. West was employed by the defendant as baggage master and was acting as such at the time of his death you will find the issues in favor of the defendant."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XVI.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

(4) "If you find from the evidence in this cause that the deceased W. B. West was an employé of the defendant, at the time he received the injuries which caused his death, and that as such employé he was engaged in interstate commerce, as hereafter explained, then the laws of the United States would govern the liability of the defendant herein."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

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XVII.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

(5) "If you find from the evidence in this action that the deceased W. B. West at the time he received the injuries which caused his death was not employé of the defendant, and if you further find that the deceased W. B. West entered into the contract introduced in evidence stipulating for a release of the defendant, then your verdict should be for the defendant."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XVIII.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

(6) "If you find from the evidence that the train upon which West was working at the time of his death engaged in commerce between the states and that he was an employé of the defendant, the plaintiff is not entitled to recover."

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XIX.

The trial court erred in refusing to instruct the jury as requested by the Plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

(7) "If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained and you are not to permit your sympathy to influence

your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish—your verdict must be based upon the financial loss in dollars and cents.”

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XX.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

(8) “If you find for the plaintiff your verdict must not exceed Ten Thousand Dollars.”

And the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

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XXI.

The trial court erred in overruling the objection of the plaintiff in error, Missouri, Kansas & Texas Railway Company, to the making and rendering of the verdict rendered by the jury in this cause, and the Supreme Court of Oklahoma erred in not correcting this error of the trial court.

XXII.

The trial court erred in refusing to set aside the verdict in this case and to award the plaintiff in error, Missouri, Kansas & Texas Railway Company, a new trial because the damages awarded by the jury were excessive and appear to have been given under the influence of passion and prejudice, and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXIII.

The trial court erred in overruling the motion of the plaintiff in error, Missouri, Kansas & Texas Railway Company, for a new trial, and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXIV.

The trial court erred in refusing to grant to the plaintiff in error, Missouri, Kansas & Texas Railway Company, a new trial, and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXV.

The trial court erred in refusing to render a judgment against the defendant in error and in favor of the plaintiffs in error, and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXVI.

The trial court erred in rendering judgment in favor of the defendant in error and against the plaintiffs in error and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

18

XXVII.

The Supreme Court of the State of Oklahoma erred in not reversing the judgment of the trial court within and for the Third Judicial District, Muskogee County, State of Oklahoma, because of each of the several errors of the latter court as to its actions and rulings as to each and every one of the several errors above specified.

XXVIII.

The Supreme Court of the State of Oklahoma erred in affirming the judgment of the trial court within and for the Third Judicial District, Muskogee County, State of Oklahoma, in this cause, and in not correcting said errors and in not reversing said judgment of the said trial court.

XXIX.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the deceased, William B. West, was not an employé of the plaintiff in error, Missouri, Kansas & Texas Railway Company, at the time of the injury resulting in his death.

XXX.

The Supreme Court of the State of Oklahoma erred in holding that the deceased, William B. West, was employed exclusively by the American Express Company, at the time of the injury resulting in his death.

XXXI.

The Supreme Court of the State of Oklahoma erred in holding that William B. West, deceased, was an employé of the Express Company only and not of the Railway Company, the evidence being undisputed in this case that the said William B. West, deceased, was a joint employé of the plaintiff in error, Missouri, Kansas & Texas Railway Company, and the American Express Company, and the parties to this cause in their pleadings and both parties and the trial court throughout the trial proceeding on the theory that West was an employé of the plaintiff in error, Missouri, Kansas & Texas Railway Company, at the time of the accident resulting in his death.

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XXXI.

The Supreme Court of the State of Oklahoma erred in holding in its opinion and judgment that under the issues as framed in this

case, the said deceased, William B. West, was an employé of the said American Express Company, and not of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXIII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the petition of the defendant in error did not allege that the deceased, William B. West, was an employé of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXIV.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the Answer of the plaintiff in error, Missouri, Kansas & Texas Railway Company, upon which the case was tried, did not allege that the deceased, William B. West, was an employé of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXV.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the reply of the defendant in error to the Answer of the plaintiff in error, Missouri, Kansas & Texas Railway Company, upon which the case was tried did not admit that the deceased, William B. West, was an employé of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXVI.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the pleadings of the defendant in error did not allege that William B. West, deceased, was an employé of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

20

XXXVII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the pleadings of the plaintiff in error, Missouri, Kansas & Texas Railway Company, did not allege that William B. West, deceased was an employé of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXVIII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the parties to this case did not join an issue of fact as to whether William B. West, deceased, was an employé of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXIX.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that there were no averments in the pleadings in this case from which an inference might reasonably be drawn that a contract of employment was entered into between the deceased and the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XL.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the rule

"That if, during the course of the trial, it develops that *that* the real case is not controlled by the state statute but by a Federal statute and the case is commenced under the former, the case pleaded is not proved and the case proved is not pleaded."

is not applicable to this case.

XLI.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the deceased, William B. West, was a passenger upon the train of the plaintiff in error, Missouri, Kansas & Texas Railway Company, at the time of his injury, resulting in his death.

XLII.

21 The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the act of Congress of April 22nd, 1908, 35 U. S. Statutes at Large, page 65, entitled "An act relating to liability of common carriers by railroad to their employes in certain cases" does not apply to and control the question of the liability of the plaintiff in error, Missouri, Kansas & Texas Railway Company, on account of the injuries resulting in the death of the said William B. West.

XLIII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that sections 5945 and 5946 of the Compiled Laws of the State of Oklahoma of 1909, Snyder, as modified by section 7, article 23, of the Constitution of the State of Oklahoma, govern this case.

XLIV.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that Section 2907 of the Compiled Laws of Oklahoma, 1909, Snyder, applies to this case.

XLV.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that this action could be properly brought or maintained under the laws of the State of Oklahoma.

XLVI.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that Section 7, Article 23, of the Constitution of the State of Oklahoma defines the rights of the defendant in error as to any matters involved in this case.

XLVII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that Section 8, Article 23, of the Constitution of the State of Oklahoma applies to any matters involved in this case.

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XLIX.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the said contracts offered in evidence, being the applications of the deceased, William B. West for situations with the said American Express Company, which said applications contain the accident releases executed by said William B. West, the benefits of which inured to the plaintiff in error, Missouri, Kansas & Texas Railway Company, and marked "Defendant's Exhibits A, B and C," respectively, and each of them, are void on account of being in contravention of the laws of the State of Kansas and of the Constitution of the State of Oklahoma.

L.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that it was not clear that the contracts offered in evidence, being the plaintiff in error, Missouri, Kansas & Texas Railway Company's, Exhibits A, B and C, and each of them, covered the employment in which the deceased, William B. West, was engaged at the time of his death and that this would be a sufficient ground for refusing to admit them in evidence.

LI.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the evidence in this case as to the employment of William B. West by the plaintiff in error, Missouri, Kansas & Texas Railway Company was not sufficient to take the case to the jury on the question of such employment.

LII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the amount of damages awarded in this case was not excessive.

23

LIII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment wherein it stated that

"From a careful investigation of the entire record, we are persuaded that if we should reverse the judgment of the court below upon the ground that the deceased suffered the injuries which resulted in his death while he was employed by the railway company, we would compel the widow to abandon the tenable theory upon which she brought the case and to accept one less advantageous to her and her children and one which it would be difficult, if not impossible, to establish."

LIV.

The Supreme Court of the State of Oklahoma erred in affirming the judgment of the trial court in this case as it is shown from said opinion of said Supreme Court of the State of Oklahoma that it asserted as a reason for affirming said judgment of the trial court the following:

"From a careful investigation of the entire record, we are persuaded that if we should reverse the judgment of the court below upon the ground that the deceased suffered the injuries which resulted in his death while he was employed by the railway company, we would compel the widow to abandon the tenable theory upon which she brought the case and to accept one less advantageous to her and her children and one which it would be difficult, if not impossible, to establish."

24

LV.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in denying and in not giving to the plaintiff in error, Missouri, Kansas & Texas Railway Company, its rights under the Constitution, Statutes and laws of the United States with reference to interstate commerce, for the reason that the plaintiff in error, Missouri, Kansas & Texas Railway Company, is, and was at the time of the injuries resulting in the death of the said William B. West, a common carrier by railroad, engaged in interstate commerce, and the deceased, William B. West, was, at the time of the injuries resulting in his death, employed by the plaintiff in error, Missouri, Kansas & Texas Railway Company, in such commerce, being employed as baggageman, and was at the time handling interstate baggage upon a train of the plaintiff in error, Missouri, Kansas & Texas Railway Company, which was engaged in moving interstate traffic.

LVI.

The Supreme Court of the State of Oklahoma erred in denying and in not giving to this plaintiff in error, Missouri, Kansas & Texas Railway Company, rights and immunities set up and claimed by said plaintiff in error under and by virtue of the Act of Congress approved April 22nd, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," found at page 65 of Vol. 35, U. S. Statutes at Large, which rights and immunities so claimed, were as follows: This is an action brought

by the defendant in error, who is the widow of the said William B. West, deceased, and brought by her for herself and minor children, but not in a representative capacity, and she had not been appointed personal representative of the estate of the said William B. West, and the pleadings and admitted facts show that the said William B. West, met his death while engaged as an employé of the plaintiff in error, Missouri, Kansas & Texas Railway Company, in interstate commerce, the said West acting as baggageman for said plaintiff in error, Missouri, Kansas & Texas Railway Company, between the points of Parsons, in the State of Kansas, through Oklahoma, and to Dallas, in the State of Texas, this said plaintiff in error, Missouri, Kansas & Texas Railway Company, being engaged as common carrier by railroad in interstate commerce at the time of the accident resulting in the death of the said William B. West, and under the provisions of said Act of Congress, the defendant in error had no right of action, and this action could not be maintained, but notwithstanding this Act of Congress, the Supreme Court of the State of Oklahoma held she could maintain the action.

Wherefore, for these and other manifest errors appearing in the record, the said Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, Plaintiffs in Error, pray that the said judgment of the said Supreme Court of the State of Oklahoma be reversed, set aside, and held for naught, and that judgment be rendered for the Plaintiffs in Error, granting to them their rights under the statutes and laws of the United States, and the said Plaintiffs in Error also pray judgment for their costs.

JOSEPH M. BRYSON,
CLIFFORD L. JACKSON,
WILLIAM R. ALLEN,
MAURICE D. GREEN,
Attorneys for Plaintiffs in Error.

26 [Endorsed:] No. —. In the Supreme Court of the United States. Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, Plaintiffs in Error, v. Ivolue B. West, Defendant in Error. Assignment of Errors. Filed Aug. 11, 1913. W. H. L. Campbell, Clerk.

27 In the Supreme Court of the State of Oklahoma.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, NATIONAL SURETY Company, and American Surety Company of New York, Plaintiffs in Error.

vs.

IVOLUE B. WEST, Defendant in Error.

Order Allowing Writ of Error.

Now on this 11th day of August, 1913, come the Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, Plaintiffs in Error, and file and present to this Court their petition praying for the allowance of a writ of error intended to be urged by them; and praying further that a duly authenticated transcript of the record, proceedings and papers, upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition this Court desiring to give petitioners an opportunity to test in the Supreme Court of the United States the questions therein presented it is ordered by this Court that writ of error be allowed as prayed; provided, however, that the said Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, Plaintiffs in Error, give bond, according to law, in the sum of Thirty Thousand (\$30,000.00) Dollars, which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 11th day of August, 1913.

[SEAL.]

SAMUEL W. HAYES,

*Chief Justice of the Supreme Court
of the State of Oklahoma.*

Attest:

W. H. L. CAMPBELL, Clerk,
By JESSIE PARDOE, Deputy.

Endorsed: In the Supreme Court of the State of Oklahoma. No. 1928. Missouri, Kansas & Texas Railway Company, et al., Plaintiff in Error, vs. Ivolue B. West, Defendant in Error. Order allowing writ of error. Filed Aug. 11, 1913. W. H. L. Campbell, Clerk.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma, before you, or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between Missouri, Kansas & Texas Railway Company, as Plaintiff in Error, and Ivolue B. West, as Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, Plaintiffs in Error, as by their complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what or right, and according to the laws and customs of the United States, should be done.

29 Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this Eleventh day of August, in the year of our Lord, One Thousand, Nine Hundred Thirteen.

Done in the City and County of Oklahoma, State of Oklahoma, with the seal of the District Court of the United States for the Western District of the State of Oklahoma attached.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,

*Clerk of the District Court of the United States
for the Western District of the State of Oklahoma,*

By ———, Deputy Clerk.

Allowed by—

SAMUEL W. HAYES,

Chief Justice of the Supreme Court of Oklahoma.

I hereby certify that a copy of the within writ of error was, on the 11th day of August, 1913, lodged in the Clerk's Office of the said Supreme Court of the State of Oklahoma by the Plaintiffs in Error for the Defendant in Error.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,

Clerk of the Supreme Court of the State of Oklahoma,

By JESSIE PARDOE, *Deputy.*

30 [Endorsed:] No. —. In the Supreme Court of the United States. Missouri, Kansas & Texas Railway Company et al., Plaintiffs in Error, vs. Ivolue B. West, Defendant in Error. Writ of Error. Filed Aug. 11, 1913. W. H. L. Campbell, Clerk.

31 In the Supreme Court of the United States.

No. —.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, NATIONAL SURETY COMPANY, and AMERICAN SURETY COMPANY OF NEW YORK, Plaintiffs in Error,

vs.

IVOLUE B. WEST, Defendant in Error.

Supersedeas Bond.

Know all men by these presents, That we, Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, as Principals, and The American Surety Company of New York, as Surety, are held and firmly bound unto the above named Ivolue B. West, Defendant in Error, in the sum of Thirty Thousand (\$30,000.00) Dollars, lawful money of the United States of America, to the payment of which well and truly to be made the said principals and the said surety bind themselves, their, and each of their, successors and assigns, jointly and severally by these presents.

Sealed with our seals, and dated this Ninth day of August, in the year of our Lord One Thousand Nine Hundred and Thirteen.

Whereas, in the District Court within and for the Third Judicial District, Muskogee County, State of Oklahoma, on the 9th day of April, 1910, Ivolue B. West, the above named defendant in error, recovered a judgment against the Plaintiff in Error, Missouri, Kansas & Texas Railway Company, for the sum of Fifteen Thousand (\$15,000.00) Dollars, which judgment, on appeal, was, by the Supreme Court of the State of Oklahoma, on the 6th day of August,

1913, affirmed, and the above named Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, Plaintiffs in Error, seek to prosecute their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above cause by the Supreme Court of the State of Oklahoma.

32 Now, therefore, the condition of this obligation is such that if the said Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, Plaintiffs in Error, shall prosecute their writ of error to effect and answer all costs and damages that may be adjudged, if they shall fail to make good their plea, then this obligation to be void; otherwise, to remain in full force and virtue.

MISSOURI, KANSAS & TEXAS RAILWAY
COMPANY,

[SEAL.] By CLIFFORD L. JACKSON, *Its Attorney.*

NATIONAL SURETY COMPANY,

[SEAL.] By CLIFFORD L. JACKSON, *Its Attorney.*

AMERICAN SURETY COMPANY OF NEW
YORK (AS PRINCIPAL),

By W. M. MORRIS, *Its Attorney in Fact.*

AMERICAN SURETY COMPANY OF NEW
YORK (AS SURETY),

By W. M. MORRIS, *Its Attorney in Fact.*

This bond approved this 11th day of August, 1913.

SAMUEL W. HAYES,
Chief Justice, Supreme Court of Oklahoma.

Endorsed: No. —. In the Supreme Court of the United States. Missouri Kansas & Texas Railway Company, et al., Plaintiff in Error, vs. Ivolue B. West, Defendant in Error. Supersedeas Bond. Filed Aug. 11 1913 W. H. L. Campbell, Clerk.

33 In the Supreme Court of the State of Oklahoma.

No. 1928.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Plaintiff in
Error,

VS.

IVOLUE V. WEST, Defendant in Error.

Notice of Oral Argument.

To the Honorable the Supreme Court of Oklahoma:

Comes now counsel for Plaintiff in error, Missouri, Kansas & Texas Railway Company, and respectfully notifies this Honorable

Court that it is their desire to present oral argument in support of their contentions in the above entitled cause.

CLIFFORD L. JACKSON,
W. R. ALLEN,
Attorneys for Plaintiff in Error.

Filed Aug. 13, 1910, W. H. L. Campbell, Clerk.

34 In the Supreme Court of the State of Oklahoma. No. —.
Missouri, Kansas & Texas Railway Company, Plaintiff in
Error, vs. Ivolue V. West, Defendant in Error. Notice of Oral
Argument.

35 Filed Aug. 13, 1910. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
IVOLUE B. WEST, Defendant in Error.

Petition in Error.

The said Missouri, Kansas and Texas Railway Company, plaintiff in error, alleges and shows to the court that at all times hereinafter mentioned it was and now is a corporation organized and existing under and by virtue of the laws of the State of Kansas, and that on the 9th day of April, 1910, the said Ivolue B. West, defendant in error herein, obtained a judgment in the District Court within and for the Third Judicial District, Muskogee County, State of Oklahoma, by consideration of said Court, for the sum of Fifteen Thousand (\$15,000.00) Dollars, with interest at the rate of seven (7%) per cent. per annum, and the costs of suit, against the Plaintiff in error herein, in a certain action pending in said District Court within and for the Third Judicial District, Muskogee County, State of Oklahoma, wherein the plaintiff in error was defendant, and the defendant in error was plaintiff.

An original case-made of which judgment and pleadings and proceedings had in said action in said court is hereto attached and made a part of this petition in error.

The said Missouri, Kansas & Texas Railway Company, plaintiff in error, alleges that there is error in said judgment and proceedings in this, to wit:

I.

36 That the said Court erred in overruling the demurrer of the plaintiff in error to the petition of the defendant in error.

II.

That the said Court erred in overruling the demurrer of the plaintiff in error to the reply of the defendant in error to the third amended answer of the plaintiff in error.

III.

That the said Court erred in overruling the objection of the plaintiff in error to the introduction of any evidence in the case, for the reason that the pleadings on the part of the defendant in error are not sufficient to support a cause of action against the plaintiff in error.

IV.

That the said Court erred in overruling the demurrer to the evidence which was interposed by the plaintiff in error at the close of the testimony introduced on behalf of the defendant in error.

V.

That the said Court erred in admitting incompetent, irrelevant, immaterial and improper evidence over the objections and exceptions of the plaintiff in error.

VI.

That the said Court erred in refusing to strike out upon motion of the plaintiff in error incompetent irrelevant, immaterial and improper evidence.

VII.

That the said court erred in excluding from the consideration of the jury competent, material, relevant and proper evidence offered by the plaintiff in error, to which action of the court the plaintiff in error excepted at the time and still excepts.

VIII.

37 That said Court erred — refusing to give to the jury instruction numbered “one” of the instructions requested by the plaintiff in error.

IX.

That the said court erred in refusing to give to the jury instruction numbered “two” of the instructions requested by the plaintiff in error.

X.

That the said court erred in refusing to give to the jury instruction numbered “threes” of the instructions requested by the plaintiff in error.

XL

That the said court erred in refusing to give to the jury instruction numbered "four" of the instructions requested by the plaintiff in error.

XII.

tion numbered "five" of the instructions requested by the plaintiff in error.

XIII.

That the said court erred in refusing to give to the jury instruction numbered "six" of the instructions requested by the plaintiff in error.

XIV.

That the said court erred in refusing to give to the jury instruction numbered "seven" of the instructions requested by the plaintiff in error.

XV.

That the said court erred in refusing to give to the jury instruction numbered "eight" of the instructions requested by the plaintiff in error.

XVI.

That the said court erred in giving to the jury instruction numbered "one" of the instructions that were given to the jury.

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XVII.

That the said court erred in giving to the jury instruction numbered "two" of the instructions that were given to the jury.

XVIII.

That the said court erred in giving to the jury instruction numbered "three" of the instructions that were given to the jury.

XIX.

That the said court erred in giving to the jury instruction numbered "four" of the instructions that were given to the jury.

XX.

That the said court erred in giving to the jury instruction numbered "4½" of the instructions that were given to the jury.

XXI.

That the said court erred in giving to the jury instruction numbered "five" of the instructions that were given to the jury.

XXII.

That the said court erred in giving to the jury instruction numbered "six" of the instructions that were given to the jury.

XXIII.

That the said court erred in overruling that motion of the plaintiff in error for a new trial.

XXIV.

That the said court erred in refusing to grant the plaintiff in error a new trial.

XXV.

That the said court erred in refusing to render judgment against the defendant in error and in favor of the plaintiff in error.

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XXVI.

That the said court erred in rendering judgment in favor of the defendant in error and against the plaintiff in error.

Wherefore, plaintiff in error prays that the said judgment so rendered be reversed, vacated, set aside and held for naught, and that judgment may be rendered in favor of the plaintiff in error and against the defendant in error upon the pleadings, and evidence, and that such further orders and judgments be rendered and entered in said cause as to this honorable court may seem proper, and that the plaintiff in error be restored to all the rights which it has lost.

W. R. ALLEN,
CLIFFORD L. JACKSON,
Attorneys for Plaintiff in Error.

Endorsed: No. —. In the Supreme Court of the State of Oklahoma. Missouri, Kansas & Texas Railway Company, Plaintiff in error, vs. Ivolue B. West, Defendant in error. Petition in error.

40 In the District Court, Third Judicial District, Muskogee
County, State of Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

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42 In the District Court, Third Judicial District, Muskogee County, State of Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Case-made.

Be it remembered that heretofore, to wit: on the 8th day of July, 1908, the plaintiff, Ivolue B. West, commenced this action against the defendant, Missouri, Kansas & Texas Railway Company, a Corporation, by filing in the office of the Clerk of the District Court of Muskogee County, State of Oklahoma, his petition in words and figures as follows:

43 STATE OF OKLAHOMA,
County of Muskogee, ss:

District Court, Third Judicial District.

IVOLUE B. WEST, Plaintiff,

vs.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, a Corporation, Defendant.

Petition.

Plaintiff complains of Defendant and alleges:

That defendant now is and during all the times herein mentioned has been a railroad corporation, duly created, organized and existing under and by virtue of the laws of the State of Kansas, and as such, during all of said times, has been engaged in the railroad business in the State of Kansas and Oklahoma and elsewhere as a common carrier of freight, express, and passengers for hire.

That during all the times herein mentioned, said defendant corporation, as a part of its said railroad business, owned and was engaged in operating a certain line of railroad, extending from St. Louis, Missouri, southerly to Parsons, Kansas, and thence from Parsons, Kansas, southerly, to the stations of Verdard and Muskogee in the State of Oklahoma, and thence southerly through the State of Oklahoma to points in the State of Texas, over which line of railroad said defendant, during all the times herein mentioned was actually engaged in carrying and transporting freight, express and passengers for hire, by trains of cars drawn by steam locomotives by it owned, operated and maintained. That said line of railroad, consisted of what is known as a single track line and

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was and is of the usual form of construction, and by said defendant, owned and maintained.

That William B. West, deceased, hereinafter named, left him surviving, as his only heirs at law, the plaintiff herein, his widow, who is thirty-six (36) years of age, and three minor children whose names and ages are as follows: viz. Norma H. West, aged sixteen, Glenford B. West, aged seven years, and Wilmetta M. West, aged two years, and also a posthumous child, born June 29th, 1908.

That this action is brought by the plaintiff as widow of said William B. West, and for the benefit of herself, as such widow, and of said minor children of herself and of said William B. West, deceased.

That said William B. West, at the time of his death, as hereinafter set out, was, and for many years prior thereto, had been a resident of the County of Labette, in the State of Kansas, and that plaintiff during all the times herein mentioned, has been and still is a resident of said County and that no personal representative of the estate of said William B. West, deceased, has been appointed.

That at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company, as express messenger upon the express cars operated by said defendant company, over its said line of railroad between said city of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas.

That in addition to his duties and employment as express messenger, as aforesaid, said William B. West also engaged in
45 handling passenger baggage upon the express cars of said defendant company.

That on May 15, 1908, at about twelve o'clock noon of said day, said William B. West, in the course of his employment as hereinbefore set out, was riding in one of the express cars of said defendant company, attached to one of the regular trains of said defendant company, being then and there run and operated by said defendant company, over said railroad line in a southerly direction through the State of Oklahoma, which train was one of the regular passenger trains of said defendant, known as "Number Five," and also known as the "Katy Flyer"; and that when said train reached a point in said State of Oklahoma, a short distance southerly of the Arkansas River, between the said stations of Verdard and Muskogee in said State of Oklahoma, said train upon which said William B. West was so riding in the performance of his duties as aforesaid, was by said defendant railroad corporation, through gross carelessness and negligence, upon its part, and while said train was running at a high and dangerous rate of speed, caused and allowed to collide in what is known as a head end collision with a locomotive and freight train, also owned, maintained, and operated by said defendant company, and which freight train was also then and there, through the gross carelessness and negligence of said defendant company, being run and operated, by said defendant company upon the same track, in a northerly direction at a high and dangerous rate of speed and that said William B. West, was by said collision and by said gross

carelessness and negligence on the part of said defendant railroad company, in causing and allowing said trains to be so run and operated upon the same track and to collide as aforesaid, and without any fault or neglect, whatsoever upon the part of said William

46 B. West, then and there caused to sustain and receive such personal bodily injuries as resulted in his immediate death.

That the expectancy of life of said William B. West at the time of his death, according to the Carlisle tables of mortality, was twenty-nine and sixty-four one hundredths years (29 64/100), and that at the time of his death, as aforesaid, said William B. West was but thirty-eight years of age and in good health of body and mind, and of strong physique and was well able to do great mental and manual labor, and to earn at least the sum of eighty-three and thirty-three one hundredths dollars (\$83.33/100) per month, at his said business and employment as express messenger and baggageman, as aforesaid, and that at said time was, in fact, actually earning and receiving from his said employment, the sum of eighty-three and thirty-three one hundredths dollars (\$83.33/100) per month, and that he would (except for his death so resulting from the neglect of said defendant) have continued to earn and receive a much larger sum per month, for at least the period of twenty-nine years (29) thereafter, and in the aggregate, at least the sum of thirty thousand dollars (\$30,000), and that plaintiff herein, and her said children would have received for their own benefit, out of said moneys that said William B. West would have earned (except for his death as aforesaid) an amount in excess of twenty-five thousand (\$25,000.) and that plaintiff and her said children have been damaged at the hands of defendant in the loss of the care, aid, advice and society of said William B. West as husband of plaintiff and father of said children in the further sum of at least twenty-five thousand (\$25,000) dollars.

47 Wherefore, Plaintiff demands judgment against said Defendant in the sum of Fifty Thousand Dollars (\$50,000) and for the costs and disbursements of this action.

S. GRANT HARRIS,
BENJ. MARTIN, JR.,
Attorneys for Plaintiff.

STATE OF KANSAS,
County of Labette, ss:

Ivolute B. West came before me personally and being duly sworn doth say that she is the Plaintiff in the above entitled cause, that she believes the facts stated in the foregoing pleading to be true.

IVOLUE B. WEST.

Signed and sworn to in my presence this 2nd day of July, 1908.

E. A. THOMAS,
Notary Public, Labette County, Kansas.

My Commission Expires Sept. 21, 1911.

Endorsed on back as follows: State of Oklahoma. County of Muskogee. District Court. Third Judicial District. Ivolue B. West, vs. The Missouri, Kansas and Texas Railway Company, State of Oklahoma. County of Muskogee. Filed, July 8, 1909, Tony Matney, District Clerk. S. Grant Harris, St. Paul, Minn., and Benj. Martin, Jr., Attorneys for Pl'ff.

48 And thereafter, and on to wit: the 8th day of August, 1908, the defendant filed in said cause, demurrer to plaintiff's petition filed herein, which said demurrer is in words and figures as follows:

49 In the District Court, Third Judicial District, Muskogee County, State of Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,

VS.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Demurrer.

Comes now the defendant and demurs to plaintiff's petition filed herein and for grounds of demurrer states:

I.

That the plaintiff has no legal capacity to sue for the minor children named in paragraph three of said petition.

II.

That there is a defect of parties plaintiff in this: that the suit is brought in the name of Ivolue B. West as plaintiff while in paragraph four of said petition it is stated that the suit was brought by the plaintiff for the benefit of herself and the minor children named in paragraph three of said petition.

III.

That the petition does not state facts sufficient to constitute a cause of action on behalf of plaintiff.

CLIFFORD L. JACKSON,
Attorney for Defendant.

Endorsed on back as follows: No. 329. In the District Court, Third Judicial District, Muskogee County, State of Oklahoma. Ivolue B. West, plaintiff vs. Missouri, Kansas & Texas Railway Company, Defendant. Demurrer. State of Oklahoma. County of Muskogee. Filed Aug. 8, 1908. Tony Matney, District Clerk.

50 Thereafter and on the 29th day of October, 1908, the demurrer of the defendant to the plaintiff's petition comes on for hearing before the Court, and after argument of counsel, the court being fully advised, overrules said demurrer and grants the defendant twenty days in which to answer, to which action of the court in overruling said demurrer, the defendant then and there excepts.

51 Thereafter, and on to-wit: the 10th day of November, 1909, the defendant herein filed in said cause its answer to plaintiff's petition, which said answer is in words and figures as follows:

52 In the District Court, Third Judicial District, Muskogee County, Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Answer.

Comes now the defendant and for answer to plaintiff's petition, denies each and every material allegation thereof.

Wherefore, having fully answered, defendant prays that it be adjudged to go hence without day with its costs in this behalf laid out and expended.

CLIFFORD L. JACKSON AND

Attorneys for Defendant.

Endorsed on back as follows: No. 329. In the District Court, Third Judicial District, Muskogee County, Oklahoma. Ivolue B. West, plaintiff, vs. Missouri, Kansas & Texas Railway Company, Defendant, Answer. State of Oklahoma. County of Muskogee, Filed Nov. 10, 1908. Tony Matney, District Clerk.

53 That thereafter, to-wit: on the 10th day of November, the defendant herein, with leave of court, first had and obtained, files in said cause its first amended answer to the petition of the plaintiff, which said first amended answer is in words and figures as follows:

54 In the District Court, Third Judicial District, Muskogee County, Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

First Amended Answer.

Comes now the defendant and, by leave of court first had and obtained, for its first amended answer to the petition filed herein denies each and every material allegation thereof.

Further answering, defendant states that even if the said William B. West, deceased, was injured and killed at the time, place, and in the manner as alleged in the plaintiff's petition, but no part of which is admitted, but all of which is denied, that his said injuries and death were not due to any negligence on the part of this defendant or any of its agents, servants, or employees, but were due solely to negligence on the part of the said William B. West.

Further answering, defendant states that it is now, and was at all times mentioned in plaintiff's petition, a common carrier by railroad engaged in commerce between the several states, and that the passenger train described by plaintiff in said petition as the "Katy Flyer" was at all times mentioned therein, an interstate train, starting from St. Louis, in the State of Missouri, and passing into and through the State of Kansas, and Oklahoma, and thence into the State of Texas, and at all times herein mentioned was engaged in the movement of interstate commerce, and defendant further states that the said freight train described in plaintiff's said petition was, on the said 15th day of May, 1908, a train starting from Muskogee, in the State of Oklahoma, and proceeding on its way over the
55 defendant's line of railway to Parsons, in the State of Kansas, and was on said date, and at all times mentioned in plaintiff's petition, engaged in moving interstate commerce.

Wherefore, having fully answered, defendant prays that it be adjudged to go hence without day, with its costs in this behalf laid out, and expended.

CLIFFORD L. JACKSON,
Attorney For Defendant.

Endorsed on back as follows: No. 329. In the District Court, Third Judicial District, Muskogee County, Oklahoma. Ivolue B. West, Plaintiff, vs. Missouri, Kansas & Texas Railway Company, Defendant. First Amended Answer. State of Oklahoma. County of Muskogee. Filed Nov. 10, 1909. W. P. Miller, District Clerk.

56 That thereafter and on to-wit, the 15th day of November, 1909, the plaintiff herein filed her reply to the first amended

answer of the defendant, which said reply is in words and figures as follows, to-wit:

57 In the District Court in and for Muskogee County, State of Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Reply to First Amended Answer.

Comes now the plaintiff herein and for reply to defendant's first amended answer filed herein denies each and every allegation thereof.

S. GRANT HARRIS, &
BENJ. MARTIN, JR.,
Attorney- for Plaintiff.

Endorsed on back as follows: No. 329—Ivolute B. West vs. M. K. & T. Ry. Co. Reply to Defendant's First Amended Answer. State of Oklahoma, County of Muskogee. Filed Nov. 15, 1909. W. P. Miller, District Clerk. Benj. Martin, Jr., Attorney for Plaintiff.

58 That thereafter and on to-wit: the 30th day of November, 1909, the defendant herein, with leave of court first had and obtained, filed in said cause its Second Amended Answer to the petition filed herein by the plaintiff, and which said Second Amended Answer is in words and figures as follows, to-wit:

59 In the District Court, Third Judicial District, Muskogee County, Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Second Amended Answer.

Comes now the defendant and by leave of court first had and obtained for its second amended answer to the petition filed herein denies each and every material allegation thereof.

Further answering, defendant states that even if the said William B. West, deceased, was injured and killed at the time, place, and in the manner as alleged in the plaintiff's petition, but no part of

which is admitted, but all of which is denied, that his said injuries and death were not due to any negligence on the part of this defendant or any of its agents, servants, or employees, but were due solely to negligence on the part of the said William B. West.

Further answering, defendant states that it is now and was at all times mentioned in plaintiff's petition, a common carrier by railroad engaged in commerce between the several states, and that the passenger train described by plaintiff in said petition as the "Katy Flyer," was at all times mentioned therein, an interstate train, starting from St. Louis, in the State of Missouri, and passing into and through the State of Kansas and Oklahoma, and thence into the State of Texas, and at all times therein mentioned was engaged in the movement of interstate commerce, and defendant further states that the said freight train described in plaintiff's said petition was, on the said 15th day of May, 1908, a
60 train starting from Muskogee, in the State of Oklahoma, and proceeding on its way over the defendant's line of railway to Parsons, in the State of Kansas, and was, on said date, and at all times mentioned in plaintiff's petition, engaged in moving interstate commerce.

Further answering defendant states that prior to the time of the alleged injury in question, the said William B. West had made application to the American Express Company in writing for employment by it as driver of one of its wagons at Parsons, Kansas, and was so engaged pursuant to the terms of a written contract, said contract being dated January 9, 1893, a copy of which contract is hereto attached marked Exhibit "A," and made a part of this answer.

Further answering defendant states that prior to the time of the alleged injury in question the deceased, William B. West, had made application to the said American Express Company in writing for employment by it as an express messenger, and that in pursuance of said application he was prior to and at the time of the alleged injury in question employed by the said American Express Company under a contract in writing between him and said Company, which contract was dated October 15, 1896, a copy of which is hereto attached, marked Exhibit "B," and made a part hereof, and which said contract includes as part of its provisions the contract hereinabove referred to and marked Exhibit "A."

Further answering defendant states that by the terms of said contract hereinabove identified as Exhibit "B," it was provided that in consideration of the premises and of the employment of deceased, he did assume all risk of accident and injury which he should meet with or sustain in the course of his employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employé of any such corporation or person, or otherwise, and whether resulting in his death or otherwise.

61 Further answering defendant states that by the terms of said contract it was provided that in case of any injury

suffered by deceased, he would at once, without demand, and at his own expense, execute and deliver to the corporation or person owning or operating the railroad, stage, or steam-boat line upon which he should be so injured, a good and sufficient release under his hand and seal of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom.

Further answering defendant states that by the terms of said contract it was provided that the deceased ratified all agreements theretofore made by said Express Company with any corporation or person operating a railroad, stage and steam boat line in which such express company had agreed in substance, that its employé- should have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and deceased further agreed to be bound by each and every of such agreement in so far as to provisions thereof relative to injury sustained by employés of the company were concerned as fully as if he were a party thereto.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did thereby authorize and empower said express company at any time while he should remain in its service to contract for him and in his behalf in its own name or in his name, with any corporations or persons operating a railroad, stage or steamboat line, for his transportation as a messenger or employé, free of charge, upon the condition and consideration that neither he nor his personal representatives, nor any person claiming under him would make any claim for compensation because of any injury sustained by him, whether resulting on the gross negligence of such corporation or persons, or any employés of such corporations or persons or otherwise, and the contract so made should be as binding and obligatory upon him as if signed and delivered by him.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did agree that the provisions of said contract should be held to inure to the benefit of any and every corporation and to all persons upon whose railroad, stage or steam-boat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporation or persons.

Further answering, defendant states that by the terms of said contract, it was provided that the deceased did agree that in consideration of his employment by said Express Company that he would assume all risks of accident or injury which he should meet with or sustain in the course of such employment, whether occasioned by negligence of said company or any of its members, officers, agents or employés or otherwise.

Further answering, defendant states that at the time of the alleged injury in question the deceased was in the express car being transported by this defendant over its said line of railway and was in said car in pursuance of said contract hereinabove referred to as Exhibit "A," and states that plaintiff is, therefore, now barred from maintaining this action.

Wherefore, having fully answered, defendant prays that it be adjudged and go hence without day, with its costs in this behalf laid out and expended.

CLIFFORD L. JACKSON,
Attorney for Defendant.

63

EXHIBIT "A."

American Express Company.

Application for Situation.

Notice to Applicants.

Hereafter, any person, desirous of engaging in the service of this Company, will, before appointment, be required to fill out this form of application and execute the Release herein, personally; qualify as a member of the Expressman's Mutual Benefit Association, unless otherwise insured, and, if required, enter into bonds with the Company for the faithful discharge of his duties, as per conditions fixed by the Company and in force at date of his employment or as may be fixed from time to time thereafter and made applicable in any renewal of bond during his employment by Company, and which conditions he is required to inform himself upon. Parties appointed to represent this Company, and engage in other business, are not expected to comply with these rules unless they wish to do so.

New York, October 1890.

1. Name in full. Will. Berdet West.
2. Where bo-nd. Miami County State of Kansas.
3. Age 23 years. Nationality American.
4. How long did you reside in your native place one year.
5. Married or single. Married Residence Parsons, Kansas.
6. If married, where does your family reside. Parsons, Kans.
7. Please fill out the following blanks, giving dates of your employment and names of employers during the past ten years.

From— (what date.)	To— (what date.)	Employed as—	At— (address.)	In service of— (name of employer or corporation.)	Under— (name of manager, sup't, or head of department.)
1882. May 1884.	1884. Aug. 1884.	Went to school. Clerk	Parsons, Kans. do.	Frank Worth-smith.	F. Worth-smith.
1885	1889	Went to school in winter and work- in barn in summer for father.			Wm. West.
1890.	Feb. 1891.	Clerk.	Parsons.	Father.	Wm. West.
Mar. 1891.	Feb. 1893.	Porter from March, 1891 to Oct. 14, '91. Driver from Oct. 15, '91 up to present time.	Parsons, Kans.	Pacific Express Co.	J. A. June.

8. What was the cause of each termination of employment. For better wages

9. Have you ever been discharged from any situation or other engagement? If so, state particulars No.

10. How have you been employed since your last employment terminated.

11. Has anything occurred in your past history that would in any manner jeopardize your standing, with or reflect discredit upon this company in case it was discovered? If so, what. No.

12. Have you any imperfection of the arms, hands, legs or feet? If so, what. No.

13. Are you now in good health. Yes.

14. Is your eyesight good. Yes.

15. Is your hearing good. Yes.

16. Have you ever had any serious illness. No. What When Where.

17. What physician attended you.

18. Have you ever had any serious illness. No. What. When Where

19. What surgeon attended you.

20. Are you addicted to the use of stimulants, or interperate in the use of alcoholic beverages? No.

21. Is your life insured? If so, state for what amount, for how long a time and in what Company. Yes \$3,000.00 life time.

65 \$2,000. in Fraternal Aid Association \$1,000. in Expressman's Mutual Benefit Association.

22. Please, give particulars respecting parents and nearest relatives if living, as follows:

Name of Father. Wm. West, Address, Unknown.
Business, Unknown.

Name of Mother. Ida West, Parsons, Kans.

Name of nearest male relative on father's side. Frank West, address Parsons, Kans.

" " " " " " mother's " Thomas F. Roberts, Osawatimie, Kans.

23. Please give below the name and addresses of as many persons as possible for references, not less than five, who are not related to you.

Name.	Occupation.	Post-Office address. No. of street if in a city.
1. M. E. Barr,	Restruant, Parsons, Kans.	West Johnson Ave.
2. B. M. Fitch,	Grocery, Parsons, Kansas	East Johnson Ave.
3. Asa Smith,	Real Estate, do.	do. do. do.
4. S. B. Cary,	Druggist, Parsons, Kans.	South Central Ave.
5. T. C. Reardon,	Contractor, do.	do.
6. Dr. B. R. Van Meter,	Real Estate, Parsons, Kans.	cor. 23 St. Johnson Ave.

7.

24. Bond required for \$1,500 subject to and in accordance with the Rules and Regulations of the American Express Company.

Dated at Parsons, State of Kansas, the 9th day of Jan'y, 1893.

(Signature of Applicant.)
WILL. BERDET WEST.

66

Description of Person Employed.

(To Be Made Out by Sup't or Agent Employing.)

Height, 5 feet 6 inches. Form Heavy set.

Weight, 155 lbs. Complexion Fair.

Color of hair, Black Color of eyes Black Kind of Nose, Straight.

If any hair is worn on face, in what manner. Smooth face.

What color —.

State fully any particular marks or deformity that would be readily recognized. Small piece out of left ear. 2 scars on left leg.

Last photograph taken attached.

I hereby certify that to all appearances the above description and foregoing statements are correct, and that the photograph attached hereto is a good likeness of applicant.

J. A. JUNE, *Ag't.*

Supt. or Agent employing the party.

Remarks.

(Under head of remarks the Supt. or Agent will give any facts he may think worthy of recording for future reference.)

This application, and a certificate as to insurance, must be sent to General Superintendent, attached to the notice of appointment of employé. General Superintendents to note on Appointment blank before forwarding same to Auditor, that a certificate as to insurance is on file.

Whereas, I, the undersigned, have entered, or am about to enter, the employ of the American Express Company, and in the course of such employment may be required to render services in the care, carriage or handling of merchandise and property in course of transportation by cars, vessels and vehicles belonging to the different railroad, stage and steam-boat lines upon which the Company relies for its means of forwarding property delivered to it to be forwarded:

And Whereas, such Express Company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be

obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employés:

Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and

injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel or vehicle, or of any employé of such corporation or person, or otherwise, and whether resulting in my death or otherwise.

And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representative, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation, or of any employé of any person or corporation, or otherwise.

And I hereby bind myself, my heirs, executors and administrators, with the payment to such Express Company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating the railroad, stage or steamboat line upon which I shall

be so injured, a good and sufficient release, under my hand
68 and seal, of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom.

I do hereby ratify all agreements heretofore made by said Express Company with any corporation or persons operating any railroad, stage and steamboat line in which such Express Company has agreed in substance that its employés shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements insofar as the provisions thereof relative to injuries sustained by employés of the Company are concerned, as fully as if I were a party thereto.

And I do hereby authorize and empower said Express Company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporations or persons operating any railroad, stage or steamboat line, for my transportation as a messenger or employé free of charge, upon the condition and consideration, that neither I nor my personal representatives, nor any person claiming under me, will make claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employé of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefits of any and every corporation, and to all persons upon whose railroad, stage or steamboat

lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporation or persons.

Witness my hand and seal this 9 day of Jan'y, one thousand eight hundred and 93.

W. B. WEST.
Parent or Guardian.

In the presence of—

J. A. JUNE, *Agt.*

NOTE.—If applicant is under age his guardian must also sign this release.

Notice.

When bonds are required from employes under the standing rules of the company, the following scale must be used.

Employe's salary or commission.				Per month.	Amount of bond.
Not Exceeding.....				\$8.33	\$300.
Over \$8.33 and not exceeding.....				10.00	500.
(In pencil)	"	10.00	" " "	15.00	700
	"	15	" " "	35.00	1,000.
	"	35.00	" " "	50.00	1,500.
	"	50.00	" " "	60.00	2,000.
	"	60.00	" " "	70.00	2,500.
	"	70.00	" " "	75.00	3,000.
	"	75.00	" " "	90.00	3,500.
	"	90.00	" " "	100.00	4,000.
	"	1,200 per year	.....		5,000.

(Here is attached photograph of deceased.)

Endorsed on back: Southern No. 534. Southern C 94 \$1,500.
Application for situation of W. B. West, Parsons. Tsp. Cl'k 10-5
99 Kans. Position Driver. Dated Feb. 1st, 1893. \$2.70 by Emp.
Exclusive.

EXHIBIT "B."

American Express Company.

Application for Situation.

Rules Governing Employment by This Company.

Any person desirous of engaging in the service of this company, must before appointment, personally fill out and execute this form of Application, obtain satisfactory Life Insurance (unless already insured), and if required, enter into bonds with the Company for the faithful discharge of his duties, as per conditions fixed by the Company and in force at date of his employment or as may be fixed from time to time thereafter and made applicable in any renewal of Bond during his employment by Company, and which conditions he is required to inform himself upon. Parties appointed to represent this Company, and engaged in other business are not expected to comply with these rules unless they wish to do so.

Persons employed by this Company are hereby notified that they are not engaged for any particular length of time, and the Company reserves to itself the right to terminate the services of any employé at pleasure; and the party executing this application does hereby acknowledge and agree to abide by such notice and conditions, and accepts employment subject to being discharged at any time by the Company or its agents.

New York, Nov., 1892.

1. Name in full William Berdett West.

2. Where born.

3. Age. years. Nationality.

5. Married or single. Residence.

6. If married, where does your family reside.

7. Please fill out the following blanks, giving dates of your employment and names of employers during the past ten years.

From— (what date.)	To— (what date.)	Employed as	At address.	In service of (name of em- ployer or corporation.	Under (name of manager supt or head of Department.)
-----------------------	---------------------	----------------	----------------	------------------------------------------------------------	--------------------------------------------------------------------

8. What was the cause of each termination of employment.

9. Have you ever been discharged from any situation or other engagement? If so, state particulars.

10. How have you been occupied since your last employment terminated.

11. Has anything occurred in your past history that would in any manner jeopardize your standing with, or reflect discredit upon this Company in case it was discovered? If so, what.

12. Have you any imperfections of the arms, hands, legs or feet? If so, what.

13. Are you now in good health.

14. Is your eyesight good.

15. Is your hearing good.

16. Have you ever had any serious illness. What. When. Where.

17. What physician attended you.

18. Have you ever received any injury. What. When. Where.

19. What surgeon attended you.

20. Are you addicted to the use of stimulants, or intemperate in the use of alcoholic beverages?

21. Is your life insured? If so, state for what amount, for how long a time, and in what Company.

22. Please give particulars respecting parents, and nearest relatives if living, as follows:

Name of Father. Address.

Business.

Name of Mother.

[On left margin:] (This page was endorsed through writing as follows, "See former application for Bonds as Driver at Parsons, Ks.")

72 Name of nearest male relative on Father's side. Address.

Name of nearest male relative on Mother's side. Address.

23. Please give below the names and addresses of as many persons as possible, for references, not less than five, who are not related to you.

Name.

Occupation.

Post-Office address.
No. of street, if in city.

1.
2.
3.
4.
5.
6.
7.

24. Bond required for \$1,500 subject to and in accordance with the Rules and Regulations of the American Express Company. Dated at Parsons, State of Kan. the 15 day of Oct. 1896.

(Signature of applicant:) WILLIAM BERDETT WEST.

Description of Person Employed.

(To be Made Out by Sup't or Agent Employing.)

Height, Feet Inches Form.

Weight lbs. Complexion.

Color of hair, Color of eyes, Kind of nose.

If any hair is worn on face, in what manner.

What color.

State fully any particular marks or deformity that would be readily recognized.

Last Photograph taken. Attached.

I hereby certify that to all appearances the above description and foregoing statements are correct, and that the photograph attached hereto is a good likeness of applicant.

Sup't or agent employing the party.

73

Remarks.

(Under head of remarks the Sup't or Agent will give any facts he may think worthy of recording for future reference.)

Accident Release.

Whereas, I, the undersigned, have entered, or am about to enter, the employment of the American Express Company, and in the course of such employment may be required to render services in the care, carriage or handling of merchandise and property in course of transportation by cars, vessels and vehicles belonging to the different railroad, stage or steamboat lines upon which the Company relies for its means of forwarding property delivered to it to be forwarded.

And Whereas, such Express Company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employes:

Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employe of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives for damages sustained by reason of my injury or

74 death, whether such injury or death result from the gross negligence of any person or corporation, or of any employe of any person or corporation, or otherwise.

And I hereby bind myself, my heirs, executors and administrators with the payment to such Express Company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense,

execute and deliver to the corporation or persons owning or operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

I do hereby ratify all agreements heretofore made by said Express Company with any corporation or persons operating any railroad, stage and steamboat line in which such Express Company has agreed in substance that its employes shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements in so far as the provisions thereof relative to injuries sustained by employes of the Company are concerned, as fully as if I were a party thereto.

And I do hereby authorize and empower said Express company, at any time while I shall remain in its service to contract for me in my behalf, in its own name or in mine, with any corporations or persons operating any railroad, stage or steamboat line, for my transportation as a messenger or employee free of charge, upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any
75 claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employe of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and of all persons upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said Company, or any of its members, officers, agents or employes, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said Company a good and sufficient release under my hand and seal, -or all claims, demands and causes of action arising out of such injury or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators with the payment to said Express Company, on demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

Witness my hand and seal this 15 day of Oct. One thousand eight hundred and 96.

WILLIAM BERDETT WEST.

Parent or Guardian.

In the presence of
C. C. GATES.

NOTE.—If applicant is under age his guardian must also sign this release.

Agreement as to Bonding, and Losses by Carelessness, Negligence or Defalcation.

This agreement, made this 15 day of Oct. A. D. 1896, between William Burdett West hereinafter called the "Subscriber" and the American Express Company, hereinafter called the "company."

Witnesseth: 1. That the subscriber to this agreement, an employé in the service of said Company, in consideration of the wages paid or to be paid to him by the said Company, hereby agrees with said Company that he will at all times hereafter keep just, true and correct accounts of all business of said Company, coming into his hands as such employé or otherwise; and will make and forward to the proper officers of said Company full, true and correct statements of the accounts of the business of said Company so coming to his hands, whenever the same shall be required by the rules and regulations of said Company, or by any officer of said Company; and will in like manner make true, full and correct statements showing the correct state of his accounts as such employé, at the end of each and every month, or as often as required, and will collect all dues and all sums of money due and payable, or which may become due and payable, to said Company, which he shall be required to collect as such employé by the rules and regulations of said Company; and will duly pay over to said Company, or authorized agent thereof, all sums of money that are now due from him to said Company, or that may hereafter become due, or that may in any manner come into his hands as such employé and belonging to said Company, whenever required by the rules and regulations of said Company, or any officer thereof; and will do and perform all and singular the duties of such employé that now are, or may hereafter be lawfully imposed upon such employé by said company, and attend diligently and faithfully thereto.

II. And the subscriber hereto expressly agrees that, if in any action at law or in equity brought upon this agreement, or if in any legal proceedings whatever, it should become necessary to show the amount of money or other property of said Company, or in which it should have any interest, at any time in his possession or control, or in any manner chargeable to him, the books, papers and records of said Company, including the printed or written instructions and circulars of any of the officers thereof, to its Agents, shall be admitted as competent evidence of whatever may therein be contained, without any other evidence of their authenticity than proof of some officer or stockholder of the Company, that they are in fact the books, papers, records, instructions or circulars thereof, or of its officers; and the evidence of any officer or stockholder of the Company shall not be excluded because of any pecuniary interest he may have in such action or proceeding.

III. And the subscriber hereto further agrees to pay to the said Company from year to year, when called upon, so long as he shall

remain in its service such sum as the said Company may consider necessary to protect it from loss on account of any act, negligence, or default of his, not exceeding, however, the rate per year fixed by the General Rules and Instructions of the Company relative to Bonding and Premium for employees of the same class performing the same duties. And the moneys so paid by the subscriber hereto, together with similar amounts paid by other employes of the Company, shall constitute a fund to secure the Company against loss by negligence, carelessness, dishonesty or disregard of the Company's rules and instructions, on the part of any of its employes contributing to said fund and may be applied by the said

78 Company to make good any such loss.

The disposition of the said fund shall be governed by the provisions of the Company's Rules and Regulations, in force from time to time, relative to Bonding and Premiums.

No moneys so paid or any part thereof, shall be returned in any case to said subscriber or any other employe, except upon the terms and conditions provided for the return of premiums in and by said Rules and Instructions.

IV. And it is also agreed that in case the subscriber hereto shall quit the service of the said Company, the Company shall have the right to withhold any moneys which may be due him until after a reasonable time for an examination of his accounts as such employe, has elapsed, and that the same may be retained by the Company, and applied in payment of any claims made against the Company, which after due investigation are determined by the Company to be proper to be paid by the subscriber hereto, on account of negligence or otherwise—and it is further agreed that salary due at any time may be applied in payment of errors in accounts rendered to the Company by the subscriber hereto.

(Sign name in Full.)

WILLIAM BERDETT WEST. [SEAL]

Witness,

G. C. GATES.

79 Rules for bonding, with conditions, rates and regulations of the Company governing same —. Subject to change at any time, on notice to be given employes through the monthly circular issued from the President's office.

1st. Bonds whenever made must expire on the following first day of May.

a. Reports of premiums paid May 1st, of each year on employe's bonds must be made as soon after that date as possible, on Form 130, entering names in alphabetical order and numbering consecutively. Thereafter reports of surety fund receipts (Premiums and Losses recovered) and Disbursements (Refunds and Losses) must be made monthly, giving the number of the bond in each and every case.

Notices of cancellations of bonds must be given in all cases.

b. All premiums collected from employes—regular, extra or temporary—must be remitted to General Superintendent for settlement with the Treasurer and not credited through Way-Bill Statements.

Where the Company has been paying the whole or any portion of premiums, the practice, when necessary, may be continued, as per standing instructions, and such payment entered in column "Paid by Co." but must not be remitted.

2nd. The amount of bonds must be in accordance with the following:

Scale.

Employé's salary or commission.	Per month.	Amount of bond.
Not exceeding	\$8.33	\$300.00
Over 8.33 and not exceeding	10.00	500.00
" 10.00 " " "	15.00	700.00
" 15.00 " " "	35.00	1,000.00
80		
" 35.00 " " "	50.00	1,500.
" 50.00 " " "	60.00	2,000.
" 60.00 " " "	70.00	2,500.
" 70.00 " " "	75.00	3,000.
" 75.00 " " "	90.00	3,500.
" \$1,200 per year		5,000.

EXCEPTIONS.—Bonds when required of Porters or Drivers who do not handle or deliver money packages may be fixed at the uniform amount of \$500.00 each.

No bonds for less than \$500.00 will be accepted from Employés who may sell Money Orders.

Branch Money Order Agents, not otherwise in the service of the Company, must give bonds for amounts equal to face value of the Money Orders in their hands at any one time.

Bonds reduced by losses in excess of \$100. if employé is thereafter retained in service of the Company, must be restored to original amount and premiums paid from date of loss to expiration of bond.

3d. The cost of bonding will be on the basis of the following:

Premium Table.

No. of month.	Bond for \$300	Bond for \$500	Bond for \$700	Bond for 1,000
1	20	30	40	60
2	40	60	80	1.20
3	60	90	1.30	1.80
81				
4	75	1.20	1.60	2.35
5	90	1.45	2.00	2.90
6	1.00	1.70	2.40	3.40
7	1.20	2.00	2.75	3.95
8	1.35	2.25	3.15	4.50
9	1.50	2.55	3.55	5.05
10	1.70	2.80	3.95	5.65
11	1.85	3.10	4.35	6.20
12	2.00	3.40	4.75	6.75

NOTE.—Fractional parts of a month considered as a whole month.

4th. Men temporarily employed for a period of thirty days, or less, to fill positions of employes absent and under pay, will be held as working under the bond of such absentee, whose bond shall be liable to the Company, in case of loss during such time. When such men are employed for a period longer than thirty days they must be regularly bonded.

Men temporarily employed for a period of thirty days or less, not filling positions of absent parties, if required to give bond will be charged with a premium and the same deducted from their pay as follows:

Bond for \$300	Bond for \$500	Bond for \$700	Bond for \$1,000
25c.	40c.	55c.	75c.

82 When such men are employed for a period longer than thirty days they must be regularly bonded.

5th. All losses sustained by the Company as the result of dishonesty, or carelessness of, or disregard of the Company's instructions by, employes bonded will be paid from the premium fund and must be charged up accordingly.

6th. Unearned premiums for the unexpired term of bonds will be allowed employes voluntarily withdrawing from the service, or whose services the Company does not longer require, 30 days after date of cancellation of bonds, in accordance with the following:

Table of Refund of Premiums for the Unexpired Term of Bonds.

Unexpired Term of Bond.	Amounts refunded on bonds of			
	\$300	\$500	\$700	\$1,000
1 month .....		....	....	....
2 months .....		....	....	....
3 months .....		....	....	....
4 "	20 cts.	40 cts.	55 cts.	75 cts.
5 "	40 cts.	75 cts.	1.05 cts.	1.50
6 "	65	1.15	1.60	2.25
7 "	85	1.50	2.10	3.00
8 "	1.10	1.90	2.65	3.75
9 "	1.30	2.25	3.15	4.50
10 "	1.55	2.65	3.70	5.25
11 "	1.75	3.00	4.20	6.00

83 No fractional parts of a month will be considered.

No unearned premium will be returned to persons discharged from the company's service, or through whose carelessness, dishonesty or disregard of the company's instructions, losses are sustained.

7th. Any surplus of premium over and above the losses and expenses sustained in connection therewith during the year, will be refunded by the Company at the expiration of each year, to persons then in the service, on a pro rata basis of the premium payment made by each. No surplus will be refunded to persons leaving or discharged from the service of the Company during the year or through whose carelessness, dishonesty, or disregard of the Company's instructions, losses are sustained.

Endorsed on the back: 43 No. Southern. Application for situation of Wm. B. West, Parsons Ks. Position Messenger. Dated Oct. 16 1896. This application must be sent to General Superintendent, attached to the notice of appointment of employé.

The General Superintendent must note on appointment blank (form 103) before forwarding same to Auditor, that the Application (form 203) duly executed, is on file at his office, otherwise, voucher for the first month's pay of a new employé will not be passed by General Accounting Office. Joint M., K. & T. Bond (1,500.00) prm. Paid. On file. Bond on file.

O. K.

F. S.

84 Endorsed on back as follows: No. 329. In the District Court, Third Judicial District, Muskogee County, Oklahoma. Ivolue B. West, Plaintiff vs. Missouri, Kansas & Texas Railway Company, Defendant. Second Amended Answer. State of Oklahoma, County of Muskogee. Filed Nov. 30, 1909. W. P. Miller, District Clerk.

85 That thereafter and on to-wit: the 7th day of December, 1909, the plaintiff and the defendant in this cause entered into a stipulation granting the plaintiff thirty days additional time in which to plead to the second amended answer filed by the defendant, which said stipulation is in words and figures as follows, to-wit:

86 In the District Court in and for Muskogee County, State of Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff.

VS.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, a Corporation,
Defendant.

Stipulation.

It is mutually agreed and stipulated between the attorneys of record for the plaintiff and the defendant herein that the plaintiff shall have thirty (30) days from this date in which to plead to the second amended answer filed by the defendant herein, and the defendant is to have thirty (30) days thereafter to plead to plaintiff's said pleading, as it may deem necessary, and this cause shall stand continued until the next term of this court.

Dated at Muskogee, Oklahoma, this 4th day of December, 1909.

S. GRANT HARRIS, &

BENJ. MARTIN, JR.,

Attorneys for Plaintiff.

CLIFFORD L. JACKSON

Attorney for Defendant.

Endorsed on back as follows: No. 329. In the District Court in and for Muskogee County, State of Oklahoma. Ivolue B.
87 West plaintiff vs. Missouri, Kansas & Texas Railway Company, Defendant. Stipulation. State of Oklahoma, County of Muskogee. Filed Dec. 7, 1909. W. P. Miller, District Clerk.

88 That thereafter and on to-wit: the 29th day of December, 1909, the plaintiff herein filed her reply to the Second Amended Answer of the Defendant filed herein, which said reply is in words and figures as follows, to-wit:

89 In the District Court, Third Judicial District, Muskogee
County, Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff.

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

The plaintiff for reply to the second amended answer of the defendant in the above entitled action, denies the said answer and each and every allegation therein contained, save as in her complaint hereinbefore stated, or as hereinafter admitted, stated or qualified:

Plaintiff denies any knowledge or information sufficient to form a belief as to the execution of Exhibits "A" and "B," attached to said answer and made a part thereof.

Further answering defendant alleges that the said pretended contract, evidenced by Exhibit- "A" and "B," purports to be, and if any such instruments were ever signed by William B. West, mentioned in the pleadings, they were so signed and said contract if it was attempted to be made at all, was attempted to be made in the State of Kansas during the years 1893 and 1896;

90 That at that time by virtue of the laws and statutes duly existing in the said State of Kansas, all Railroad Companies operating within said State of Kansas, were liable for all damages done to persons or property if done in consequence of any negligence upon the part of said Railroad Companies and by the laws and statutes of said State, all contracts by which it was attempted to release any Railroad Company from such damages, was void as being in violation of said laws and statutes and of the public policy of the State of Kansas, and that said laws and statutes ever since have and still do exist and are in force in said State of Kansas, and that said contract was wholly without consideration:

That by reason of the existence of said laws and statutes and the want of consideration, aforesaid, the said pretended contract or the evidence thereof purporting to exist in Exhibit- "A" and "B" attached to the answer of the defendant were and are wholly void and of no effect.

Wherefore plaintiff demands judgment as prayed in her complaint.

S. GRANT HARRIS &
BENJ. MARTIN, JR.,
Attorneys for Plaintiff.

91 Endorsed on back as follows: 329. Ivolue B. West vs. Mo.,
Kans. & Tex. Ry. Reply to second amended answer. State
of Oklahoma, County of Muskogee. Filed Dec. 29, 1909.
W. P. Miller, District Clerk.

92 That thereafter and on to-wit: the 28th day of March, 1910, the defendant herein, with leave of court first had and obtained, filed in said cause, its Third Amended Answer to the petition of the plaintiff, which said Third Amended Answer is in words and figures as follows, to wit:

93 In the District Court, Third Judicial District, Muskogee County, Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,

VS.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Third Amended Answer.

Comes now the defendant and by leave of Court first had and obtained, for its third amended answer to the petition filed herein denies each and every material allegation thereof:

Further answering, defendant states that even if the said William B. West, deceased, was injured and killed at the time, place and in the manner as alleged in the plaintiff's petition, but no part of which is admitted, but all of which is denied, that his said injuries and death were not due to any negligence on the part of this defendant or any of its agents, servants, or employes, but were due solely to negligence on the part of the said William B. West.

94 Further answering, defendant states that it is now and was at all times mentioned in plaintiff's petition a common carrier by railroad engaged in commerce between the several States, and that the passenger train described by plaintiff in said petition as the "Katy Flyer" was at all times mentioned therein, an interstate train, starting from St. Louis, in the State of Missouri, and passing into and through the States of Kansas, and Oklahoma, and thence into the State of Texas, and at all times therein mentioned was engaged in the movement of interstate commerce, and defendant further states that the said freight train described in plaintiff's said petition, was on the said 15th day of May, 1908, a train starting from Muskogee, in the State of Oklahoma, and proceeding on its way over the defendant's line of railway to Parsons, in the State of Kansas, and was on said date, and at all times mentioned in plaintiff's petition, engaged in moving interstate commerce.

Further answering defendant states that prior to the time of the alleged injury in question, the said William B. West had made application to the American Express Company in writing for employment by it as a driver of one of its wagons at Parsons, Kansas, and was so engaged pursuant to the terms of a written contract, said contract being dated January 9, 1893, a copy of which contract is hereto attached marked Exhibit "A" and made a part of this answer.

Further answering defendant states that prior to the time of the alleged injury in question the deceased, William B. West, had made application to the said American Express Company in writing for employment by it as an express messenger, and that in pursuance of said application he was prior to and at the time of the alleged injury in question employed by the said American Express Company, under a contract in writing between him and said Company, which contract was dated October 15th, 1896, a copy of which is hereto attached, marked Exhibit "B," and made a part hereof, and which said contract includes as part of its provisions the contract hereinabove referred to and marked Exhibit "A."

Further answering defendant states that by the terms of said contract hereinabove identified as Exhibit "B," it was provided that in the consideration of the premises and of the employment of deceased, he did assume all risk of accident and injury which he should meet with or sustain in the course of his employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employé of any such corporation or person, or otherwise, and whether resulting in his death or otherwise.

Further answering, defendant states that by the terms of said contract it was provided that in case of any injury suffered by deceased, he would at once, without demand, and at his own expense, execute and deliver to the corporation or person owning or operating the railroad state or steamboat line upon which he should be so injured, a good and sufficient release under his hand and seal of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom.

Further answering, defendant states that by the terms of said contract it was provided that the deceased ratified all agreements theretofore made by said Express Company and any corporation or person operating a railroad, state and steamboat line in which such express company had agreed in substance, that its employés should have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and deceased further agreed to be bound by each and every of such agreement insofar as to provisions thereof relative to injury sustained by employés of the Company were concerned as fully as if he were a party thereto.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did thereby authorize and empower said express company at any time while he should remain in its service to contract for him and in his behalf in its own name, or in his name, with any corporation or persons operating a railroad, stage or steamboat line, for his transportation as a messenger or employé, free of charge, upon the condition and consideration that neither he nor his personal representatives, nor any person claiming under him would make any claim for compensation because of injury sustained by him, whether resulting on the

gross negligence of such corporations or persons, or of any employes of such corporations or persons or otherwise, and the contract so made should be as binding and obligatory upon him as if signed and delivered by him.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did agree that the provisions of said contract should be held to inure to the benefit of any and every corporation and to all persons upon whose railroads, state or steam-boat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did agree that in consideration of his employment by said Express Company that he would assure all risks or accident or injury which he would meet with or sustain in the course of such employment, whether occasioned by negligence of said Company or any of its members, officers, agents, or employes, or otherwise.

Further answering, defendant states that at the time of the alleged injury in question the deceased was in the express car referred to in plaintiff's petition, being transported by this defendant over its said line of railway from points in the State of Kansas through the State of Oklahoma and into the State of Texas, and was in said car in pursuance of said contract hereinabove referred to as Exhibit "B," and states that plaintiff is, therefore, now barred from maintaining this action.

96 Further answering, defendant admits that at and prior to the death of the said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway Company over its line of railroad between the City of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas, and admits that the deceased, William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express car of the said defendant railway company, and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage was doing so under and by virtue of his said employment by the said American Express Company, and that such handling of such baggage by said West was for and in behalf of and under the direction of said Railway Company.

Wherefore, Having fully answered, defendant prays that it be adjudged to go hence without day, with its costs in this behalf laid out and expended.

CLIFFORD L. JACKSON,
Attorney for Defendant.

EXHIBIT "A."

Offered in Evidence, p. 168. Marked Ex. B, by Court Reporter.

American Express Company.

Application for Situation.

Notice to Applicant.

Hereafter, any person, desirous of engaging in the service of this Company, will, before appointment, be required to fill out this form of application and execute the Release herein, personally; qualify as a member of the Expressman's Mutual Benefit Association, unless otherwise insured, and, if required, entering bonds with the Company for the faithful discharge of his duties, as per conditions fixed by the Company and in force at date of his employment or as may be fixed from time to time thereafter and made applicable in any renewal of bond during his employment by Company, and which conditions he is required to inform himself upon. Parties appointed to represent this Company, and engaged in other business, are not expected to comply with these rules unless they wish to do so.

New York, October, 1890.

1. Name in full Will Berdet West.
2. Where born Miami County, State of Kansas.
3. Age 23 years. Nationality American.
4. How long did you reside in your native place One year.
5. Married or single Married Residence, Parsons, Kans.
6. If married, where does your family reside, Parsons, Kans.

100 7. Please fill out the following blanks, giving dates of your employment and names of employers during the past ten years.

From— (what date).	To— (what date).	Employed as—	At— address.	In service of— (name of employer or corporation).	Under (name of manager, supt. or head of department).
1882 May, 1884 ..	1884 Aug., 1884.	Went to school. Clerk.	Parsons, Kan. Do.	Frank Worthsmith.	F. Worthsmith.
1885	1889	Went to school in winter and work- in barn in summer for father.	Parsons.		Wm. West.
1890 March, 1891.	Feb., 1891. Feb., 1893.	Clerk. Porter from March, 1891, to Oct. 14/91. Driver from Oct. 15/91 up to present time.	Parsons. Parsons, Kan.	Father. Pacific Express Company.	Wm. West. J. A. June.

8. What was the cause of each termination of employment for better wages.

9. Have you ever been discharged from any situation or other engagement? If so, State particulars. No.

10. How have you been occupied since your last employment terminated.

11. Has anything occurred in your past history that would in any manner jeopardize your standing with, or reflect discredit upon this Company in case it was discovered? If so, what? No.

12. Have you any imperfection of the arms, hands, legs or feet? If so what. No.

13. Are you now in good health. Yes.

14. Is your eyesight good. Yes.

15. Is your hearing good. Yes.

16. Have you ever had any serious illness. No. What, when where.

17. What physician attended you.

18. Have you ever received any injury. No. What, When, Where.

19. What surgeon attended you.

20. Are you addicted to the use of stimulants, or interperate in the use of alcoholic beverages? No.

21. Is your life insured? If so, state for what amount, for how long a time and in what Company. Yes \$3,000.00, life time, \$2,000 in Fraternal Aid Association \$1,000 in Expressman's Mutual Benefit Association.

22. Please give particulars respecting parents and nearest relatives, if living, as follows:

Name of Father, Wm. West. Address Unknown.
Business Unknown.

Name of Mother. Ida West, Parsons, Kans.

Name of nearest male relative on Father's side, Frank West.

102 Address, Parsons, Kans.

Name of Nearest male relative on Mother's side. Thomas

F. Roberts. Address, Osawatomie, Kans.

23. Please give below the names and address of as many persons as possible for references, not less than five, who are not related to you.

Name.	Occupation.	Post Office Address No. of Street, if in a City.
1. M. E. Barr,	Restruant,	Parsons, Kans. west Johnson Ave.
2. B. M. Fitch,	Grocery,	Parsons, Kas. Do. Do.
3. Asa Smith,	Real Estate,	Do. Do. Do. Do.
4. S. B. Carey,	Druggist,	Parsons, Kans, south Central Ave.
5. T. C. Bearden,	Contractor,	Do. Do. Do. Do.
6. Dr. B. R. Van Meter,	Real Estate	Parsons, Kans., Cor. 23rd and Johnson Ave.

7. 24. Bond required for \$1,500 subject to and in accordance with the rules and regulations of the American Express Company.

Dated at Parsons, State of Kansas, the 9th day of Jan'y, 1893.

(Signature of Applicant.)
WILL BERDET WEST.

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Description of Person Employed.

(To be Made Our by Sup't or Agent Employing.)

Height 5 feet 6 inches, Form Heavy set.

Weight 155 lbs. Complexion Fair.

Color of hair, Black. Color of eyes, Black. Kind of Nose, Straight.

If any hair is worn on the face, in what manner Smooth face.

What Color.

State fully any particular marks or deformity that would be readily recognized. Small piece out of left ear. 2 scars on left leg.

Last photograph taken attached.

I hereby certify that to all appearances the above description and foregoing statements are correct, and that the photograph attached hereto is a good likeness of applicant.

J. A. JUNE, *Agt.*
Sup't or Agent employing the party.

Remarks.

(Under head of remarks the Sup't or Agent will give any facts he may think worthy of recording for future reference.)

This application, and a certificate as to insurance, must be sent to General Superintendent, attached to the notice of appointment of employé. General Superintendent to not on appointment blank, before forwarding same to Auditor, that a certificate as to insurance is on file.

104 Whereas, I the undersigned, have entered, or am about to enter, the employ of the American Express Company, and in the course of such employment may be required to render services in the care, carriage or handling of merchandise and property in course of transportation by cars, vessels and vehicles, belonging to the different railroad, stage and steamboat lines upon which the company relies for its means of forwarding property delivered to it to be forwarded;

And Whereas, such Express Company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employés:

Now, Therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel or vehicles, or of any employé of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation, or any of employé of any person or

105 corporation or otherwise.

And I hereby bind myself, my heirs, executors and administrators, with the payment to such Express Company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all

claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

I do hereby retify all agreements heretofore made by said Express Company with any corporation or persons operating any railroad, stage and steamboat line in which such Express Company has agreed in substance that its employes shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements insofar as the provisions thereof relative to injuries sustained by employes of the Company are concerned, as fully as if I were a party thereto.

And I do hereby authorize and empower said Express Company, at any time while I shall remain in its service, to contract
106 for me and in my behalf, in its own name or in mine, with any corporations or persons operating any railroad, stage or steamboat line, for my transportation as a messenger or employe free of charge, upon the condition and consideration, that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employe of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and to all persons upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

Witness my hand and seal this 9 day of Jany., one thousand eight hundred and 93.

W. B. WEST.

_____,
Parent or Guardian.

In the presence of

J. A. JUNE, *Agt.*

NOTE.—If applicant is under age his guardian must also sign this release.

Notice.

When bonds are required from employes under the standing rules of the Company, the following scale must be used:

1. Name in full William Berdett West.
2. Where born.
- 109 3. Age years Nationality.
4. How long did you reside in your native place.
5. Married or single. Residence.
6. If married, where does your family reside.
7. Please fill out the following blanks, giving dates of your employment and names of employers during the past ten years.

From— (what date.)	To— (what date.)	Employed as	At address.	In service of (name of employer or corporation.	Under (name of manager supt or head of Department.)
-----------------------	---------------------	----------------	----------------	-------------------------------------------------------	-----------------------------------------------------------------

8. What was the cause of each termination of employment?
9. Have you ever been discharged from any situation or other engagement? If so, state particulars.
10. How have you been occupied since your last employment terminated?
11. Has anything occurred in your past history that would in any manner jeopardise your standing with, or reflect discredit upon this Company in case it was discovered? If so, what.
12. Have you any imperfections of the arms, hands, legs or feet? If so, what.
13. Are you now in good health.
14. Is your eyesight good.
15. Is your hearing good.
16. Have you ever had any serious illness. What When Where.
17. What physician attended you.
- 110 18. Have you ever received any injury What When Where.
19. What surgeon attended you.
20. Are you addicted to the use of stimulants, or intemperate in the use of alcoholic beverages?
21. Is your life insured? If so, state for what amount, for how long a time, and in what Company.
22. Please give particulars respecting parents and nearest relatives, if living, as follows:
Name of father, Address
Business.
Name of Mother.
Name of nearest male relative on father's side Address
Name of nearest male relative on mother's side Address
23. Please give below the names and addresses of as many persons as possible for references, not less than five, who are not related to you.

Name.	Occupation.	Post office address. No. of street, if in a City.
-------	-------------	------------------------------------------------------

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.

[On left margin:] (This page was endorsed through writing as follows: "See former application for bond as Driver at Parsons, K's.")

24. Bond required for \$1,500.00 subject to and in accordance with the rules and regulations of the American Express Company. Dated at Parsons, State of Ka's, the 15 day of Oct. 1896.

(Signature of applicant:) WILLIAM BERDETT WEST.

Description of Person Employed.

(To be Made Out by Sup't or Agent Employing.)

Height Feet Inches Form.

Weight lbs Complexion.

Color of hair, Color of eyes, Kind of nose.

If any hair is worn on face, in what manner.

What color.

State fully any particular marks or deformity that would be readily recognized.

Last photograph taken attached.

I hereby certify that to all appearances the above description and foregoing statements are correct, and that the photograph attached hereto is a good likeness of applicant.

Sup't or agent employing the party.

Remarks.

(Under head of remarks the Sup't or Agent will give any facts he may think worthy of recording for future reference.)

Accident. Release.

Whereas, I, the undersigned, have entered, or am about to enter the employment of the American Express Company, and
112 in the course of such employment may be required to render services in the care, carriage or handling of merchandise and property in course of transportation by cars, vessels and vehicles belonging to the different railroad, state and steamboat lines upon

which the Company relies for its means of forwarding property delivered to it to be forwarded:

And, Whereas, such Express Company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employés:

Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employé of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death,
 113 whether such injury of death result from the gross negligence of any person or corporation, or of any employé of any person or corporation, or otherwise.

And I hereby bind myself, my heirs, executors and administrators with the payment to such Express Company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating the railroad stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

I do hereby ratify all agreements heretofore made by said Express Company with any corporation or persons operating any railroad, stage and steamboat line in which such Express Company has agreed in substance that its employés shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements in so far as the provisions thereof relative to injuries sustained by employés of the Company are concerned, as fully as if I were a party thereto.

And I do hereby authorize and empower said Express company,
 114pany, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporations or persons operating any railroad, stage or steamboat line, for my transportation as a messenger or employé free of charge, upon the condition and consideration that neither I

nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employé of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and all persons upon whose railroad, stage or steamboat line the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporation or persons.

I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said Company, or any of its members, officers, agents, or employes, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said Company a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury or connected therewith,
 115 or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators with the payment to said Express Company, on demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

Witness my hand and seal this 15 day of Oct. one thousand eight hundred and 96.

WILLIAM BERDET WEST.

 Parent or Guardian.

In the presence of
 G. C. GATES.

NOTE.—If applicant is under age his guardian must also sign this release.

116 *Agreement as to Bonding, and Losses by Carelessness, Negligence or Defalcation.*

This agreement, made this 15 day of Oct. A. D. 1896, between William Berdet West, hereinafter called the "Subscriber," and the American Express Company, hereinafter called the "Company—

Witnesseth:—I. That the Subscriber to this agreement, an employé in the service of said Company, in consideration of the wages paid or to be paid to him by the said Company, hereby agrees with said Company that he will at all times hereafter keep just, true and correct accounts of all business of said Company, coming into his hands as such employé or otherwise; and will make and forward to the proper officers of said Company, full, true and correct statements

of the accounts of the business of said Company so coming to his hands, whenever the same shall be required by the rules and regulations of said Company, or by any officers of said Company; and will in like manner make true, full and correct statements showing the correct state of his accounts as such employé, at the end of each and every month, or as often as required; and will collect all dues and all sums of money due and payable, or which may become due and payable, to said Company, which he shall be required to collect as such employé by the rules and regulations of said Company; and will duly pay over to said Company, or authorized agent thereof, all sums of money that are now due from him to said Company

or that may hereafter become due, or that may in any
 117 manner come into his hands as such employé and belonging to said Company, whenever required by the rules and regulations of said Company, or any officer thereof; and will do and perform all and singular the duties of such employé that now are, or may hereafter be lawfully imposed upon such employé by said Company, and attend diligently and faithfully thereto.

II. And the subscriber hereto expressly agreed that, if in any action at law or in equity brought upon this agreement, or if in any legal proceedings whatever, it should become necessary to show the amount of money or other property of said Company, or in which it should have any interest, at any time in his possession or control, or in any manner chargeable to him, the books, papers and records of said Company, including the printed or written instructions and circulars of any of the officers thereof, to its Agents, shall be admitted as competent evidence of whatever may therein be contained, without any other evidence of their authenticity than proof by some officer or stockholder of the Company, that they are in fact the books, papers, records, instructions or circulars thereof, or of its officers; and the evidence of any officer or stockholder of the Company shall not be excluded because of any pecuniary interest he may have in such action or proceeding.

III. And the subscriber hereto further agrees to pay to the said Company, from year to year, when called upon, so long as he shall remain in its service, such sum as the said Company may consider necessary to protect it from loss on account of any act, negligence or default of his, not exceeding, however, the rate per year
 118 fixed by the General Rules and Instructions of the Company relative to Bonding and premium for employés of the same class performing the same duties. And the moneys so paid by the subscriber hereto, together with similar amounts paid by other employés of the Company, shall constitute a fund to secure the Company against loss by negligence, carelessness, dishonesty or disregard of the Company's rules and instruction, on the part of any of its employés contributing to said fund, and may be applied by the said Company to make good any such loss.

The disposition of the said fund shall be governed by the provisions of the Company's rules and instruction, in force from time to time, relative to Bonding and Premiums.

No moneys so paid, or any part thereof, shall be returned in any

case to said subscriber or any other employé, except upon the terms and conditions provided for the return of premiums in and by said rules and Instructions.

IV. And it is also agreed that in case the subscriber hereto shall quit the service of the said Company, the Company shall have the right to withhold any moneys which may be due him until after a reasonable time for an examination of his accounts as such employé, has elapsed and that the same may be retained by the Company, and applied in payment of any claims made against the Company, which after due investigation are determined by the Company to be proper to be paid by the subscriber hereto, on account of negligence or otherwise—and it is further agreed that salary due at any time may be applied in payment of errors in accounts rendered to the Company by the subscriber hereto.

119

(Sign name in full.)

WILLIAM BERDETT WEST. [SEAL.]

Witness,

G. C. GATES.

Rules for bonding, with conditions, rates and regulations of the Company governing same—Subject to changes at any time, on notice to be given employés through the monthly circular issued from the President's office.

1st. Bonds, whenever made must expire on the following first day of May.

a. Reports of premiums paid May 1st of each year on employé's bonds must be made as soon after that date as possible, on Form 130, entering name in alphabetical order and numbering consecutively. Thereafter reports of surety fund receipts (Premiums and losses recovered) and Disbursements (Refunds and Losses) must be made monthly, giving the number of the bond in each and every case.

Notices of cancellation of Bonds must be given in all cases.

b. All premiums collected from employés—regular, extra or temporary—must be remitted to General Superintendent for settlement with the Treasurer and not credited through Way-bill statements.

Where the Company has been paying the whole or any portion of premiums, the practice, when necessary, may be continued, as per standing instructions, and such payment entered in column 120 "paid by Co." but must not be remitted.

2nd. The amount of bonds must be in accordance with the following:

Employé's Salary or commission.	Scale.	Per month.	Amount of bond.
Not Exceeding		\$8.33	\$300
Over \$8.33 and not exceeding.....		10.00	500
Over 10.00 " " "		15.00	700
" 15.00 " " "		35.00	1,000
" 35.00 " " "		50.00	1,500
" 50.00 " " "		60.00	2,000
" 60.00 " " "		70.00	2,500
" 70.00 " " "		75.00	3,000
" 75.00 " " "		90.00	3,500
" 90.00 " " "		100.00	4,000
" 1,200 per year			5,000

EXCEPTIONS.—Bond when required of Porters or Drivers who do not handle or deliver money packages may be fixed at the uniform amount of \$500.00 each.

No bonds for less than \$500. will be accepted from Employés who may sell Money orders.

Branch Money Order Agents, not otherwise in the service of the Company, must give bonds for amounts equal to face value of the Money Orders in their hands at any one time.

Bonds reduced by losses in excess of \$100, if employé is thereafter retained in service of the Company, must be restored to original amount and premiums paid from date of loss to expiration of bond.

121 3d. The cost of bonding will be on the basis of the following:

Premium Table.

No. of Month.	Bond for \$300	Bond for \$500	Bond for \$700	Bond for \$1,000
1	20	30	40	60
2	40	60	80	1.20
3	60	90	1.20	1.80
4	75	1.20	1.60	2.35
5	90	1.45	2.00	2.90
6	1.00	1.70	2.40	3.40
7	1.20	2.00	2.75	3.95
8	1.35	2.25	3.15	4.50
9	1.50	2.55	3.55	5.05
10	1.70	2.80	3.95	5.65
11	1.85	3.10	4.35	6.20
12	2.00	3.40	4.75	6.75

NOTE.—Fractional parts of a month considered as a whole month.

4th. Men temporarily employed for a period of thirty days, or less, to fill positions of employés absent and under pay, will be held

as working under the bond of such absentee, whose bond shall be liable to the Company, in case of loss during such time. When such men are employed for a period longer than thirty days they must be regularly bonded.

Men temporarily employed for a period of thirty days or less, not filing positions of absent parties, if required to give bonds will be charged with a premium and the same deducted from their pay as follows:

122

Bond for	Bond for	Bond for	Bond for
\$300.	\$500.	\$700.	\$1,000.
25c.	40c.	55c.	75c.

When such men are employed for a period longer than thirty days they must be regularly bonded.

5th. All losses sustained by the Company as the result of dishonesty, or carelessness of, or disregard of the Company's instructions, by Employés Bonded will be paid from the Premium Fund and must be charged up accordingly.

6th. Unearned premiums for the unexpired term of Bonds will be allowed employés voluntarily withdrawing from the service, or whose services the Company does not longer require, 30 days after date of cancellation of bonds, in accordance with the following:

Table of Refund of Premiums for the Unexpired Term of Bonds.

Unexpired Term of Bond.	Amounts Refunded on Bonds of			
	\$300	\$500	\$700	\$1,000
1 month	.....	.....	.....	.....
2 months	.....	.....	.....	.....
3 "	.....	.....	.....	.....
4 "	20 cts.	40 ct.	55 cts.	75 cts.
5 "	40	75	1.05	1.50
6 "	65	1.15	1.60	2.25
7 "	85	1.50	2.10	3.00
8 "	1.10	1.90	2.65	3.75
9 "	1.30	2.25	3.15	4.50
10 "	1.55	2.65	3.15	5.25
11 "	1.75	3.00	4.20	6.00

123 No fractional parts of a month will be considered. No unearned premium will be returned to person discharged from the Company's service, or through whose carelessness, dishonesty or disregard of the Company's instructions, losses are sustained.

7th. Any surplus of Premium over and above the losses and expenses sustained in connection therewith during the year, will be refunded by the Company at the expiration of each year, to the persons then in the services, on a pro rate basis of the premium payment made by each. No surplus will be refunded to persons

leaving or discharged from the service of the Company during the year or through whose carelessness, dishonesty, or disregard of the Company's instructions, losses are sustained.

Endorsed on back: 43 No. Southern. Application for Situation of Wm. B. West Parsons Ks. Position, Messenger. Dated Oct. 18, 1896. This application must be sent to General Superintendent, attached to the notice of appointment of employé.

The General Superintendent must note on appointment blank (form 103) before forwarding same to Auditor, that the Application (form 203) duly executed, is on file at his office, otherwise, voucher for the first month's pay of a new employé will not be passed by General Accounting Office. Joint M., K. & T. Bond (1,500.00). Prm. Paid. On File. Bond on file.

O. K.

F. S.

Endorsed on back as follows: In the District Court, Third Judicial District, Muskogee County, Oklahoma. Ivolue B. West, Plaintiff vs. Missouri, Kansas & Texas Railway Company Defendant.
124 Third Amended Answer. State of Oklahoma County of Muskogee. Filed Mar. 26, 1910. W. P. Miller District Clerk.

125 That on the 29th day of March, 1910, the plaintiff in this cause filed her reply to the third amended answer of the defendant herein, which said reply is in words and figures as follows, to wit:

126 In the District Court, Third Judicial District, Muskogee County, Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,

vs.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Defendant.

Reply to Third Amended Answer.

I.

Plaintiff for her reply to the third amended answer of defendant, save as in her complaint alleged and as hereinafter alleged, incorporated, admitted or qualified, denies each and every allegation, averment, matter and thing in said third amended answer contained.

II.

Further replying plaintiff hereby refers to and adopts repeats and reaffirms each and all of the allegations as set out and alleged in

her reply to the second amended answer of said defendant and incorporates the same herein and makes them a part of her reply, in like manner as though they were specifically set out and realleged herein; and plaintiff further specifically denies that the pretended contracts and each of them set out and referred to in defendant's second and third amended answers were valid or in force at 127 the time of the collision set out in plaintiff's complaint or at any time, and specifically denies that said decedent, William B. West, was at the time of his death or at any other time, working under said pretended contracts, or either of them; and specifically denies that on the day of his death or at any other time he was riding in said car of defendant in pursuance of said pretended contracts or either of them or of any written contract as alleged in defendant's second and third amended answers.

III.

Further replying plaintiff alleges that at the time said contracts and each and both of them were made and ever since the making thereof the statutes of the State of Kansas have provided as follows, to wit:

"That railroads in this State shall be liable for all damages done to person or property when done in consequence of any neglect on the part of the railroad company."

Wherefore plaintiff demands judgment against said defendant as prayed for in her complaint herein.

IVOLUE B. WEST,
By S. GRANT HARRIS &
BENJ. MARTIN,
Attorneys for Plaintiff.

Also as follows, to wit: "Every railroad company organized and doing business in the State of Kansas shall be liable for all damages done to any employé of said Company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employes, to any person sustaining such damage." Provided that notice in writing that an injury has been sustained stating the time and place thereof shall have been given by or on behalf of the person injured to such railroad company within eight months 128 after the occurrence of the injury."

Endorsed on back as follows: No. 329. Ivolue B. West, Plaintiff vs. M., K. & T. Railway Co., Defendant. Reply to Third Amended Answer. State of Oklahoma. County of Muskogee. Filed Mar. 29, 1910. W. P. Miller, District Clerk. S. Grant Harris, Benj. & Villard Martin, Attorneys for Plaintiff.

129 That thereafter, and on to-wit: the 29th day of March, 1910, the defendant filed its demurrer to plaintiff's reply to defendant's third amended answer, which said demurrer is in words and figures as follows, to-wit:

130 In the District Court, Third Judicial District, Muskogee County, State of Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Demurrer to Plaintiff's Reply to Defendant's Third Amended Answer.

Comes now the defendant and demurs to the second paragraph of plaintiff's reply to the defendant's third amended answer for the following reasons, to wit:

Said paragraph does not state facts sufficient to avoid the allegations of the defendant set up in its third amended answer and relied upon as a defence in this action.

Defendant further demurs to the third paragraph of the plaintiff's reply to the defendant's third amended answer, for the reason that said paragraph does not state facts sufficient to avoid the allegations set up as a defence by the defendant in its third amended answer.

Wherefore, the defendant prays judgment of the court upon its demurrer.

CLIFFORD L. JACKSON,

J. G. ROLLS,

Attorneys for Defendant.

131 Endorsed on back as follows: No. 329. In the District Court, Third Judicial District, Muskogee County, State of Oklahoma, Ivolue B. West, Plaintiff vs. Missouri, Kansas & Texas Railway Company, Defendant. Demurrer to Plaintiff's reply to Defendant's Third Amended Answer. State of Oklahoma, County of Muskogee, Filed Mar. 29, 1910. W. P. Miller, District Clerk.

132 Thereafter and on the 29th day of March, 1910, and during the February 1910, term of the said Court, the demurrer of the defendant to the plaintiff's reply to the defendant's third amended answer came on for hearing before the Court, and after argument of counsel, the court being fully advised in the premises, overrules said demurrer to which action of the court in overruling said demurrer the defendant then and there excepts.

133 That on the 29th day of March, 1910, the plaintiff herein filed her motion to the defendant to produce certain papers, books and documents, which said notice is in words and figures as follows, to wit:

134 In the District Court, 3rd Judicial District, Muskogee County,
State of Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,

VS.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Notice to Produce.

You will please take notice that you are hereby demanded and required to produce at the trial of the above entitled action the following papers, books and documents for the use of plaintiff upon the trial of said action, to-wit: any and all contracts, writings and memoranda in your possession or under your control relating to the employment by you of William B. West, deceased, referred to in the complaint in this action, including the contract of employment under which he was acting at the time of his death by collision of the train referred to in plaintiff's complaint. Also the contract, memoranda and other writings made and entered into between the defendant, Railroad Company, in the above entitled action and the Express Company with whom said deceased, William B. West, was connected at the time of said collision, and also the contract, writings and other memoranda between said Express Company and said William B. West relating to the employment in which he was engaged at the time of his death by said collision.

135 Also all books, memoranda and accounts of said defendant, Railroad Company, showing the amount of salary or wages paid by it to said deceased, William B. West, during his employment in said Company and also the amount paid to said West by said Express Company in connection with said defendant, Railroad Company and by the station agents in its employ and the telegraph agreements between said Railroad Company and said Express Company with respect to the payment of the salary or wages of said West.

Also the books, records and memoranda of said defendant, Railroad Company, showing its official schedule of the two trains which collided on May 15th, 1908, referred to in plaintiff's complaint; also the books, memoranda and writings made by said defendant, Railroad Company and by the station agents in its employ and the telegraph operators dispatching said train for said defendant, Railroad Company, showing the time of the arrival of said trains (so colliding) at the various respective stations along the line on either side of the point of said collision of said trains, including the dispatching orders of said freight train from Muskogee and of said passenger train from Wagoner on said May 15th, 1908.

Also all memoranda and writings issued by said defendant, Railroad Company or any of its employes, to the engineers and conductors upon said two trains so colliding at all times within three hours prior to the time of said collision, including the orders delivered to

said engineers and conductors by the station agents and telegraph operators at said stations of Muskogee and Wagoner on said May 15th, 1908.

Also all books, memoranda and writings made by said railroad Company or any and all of its employees after said collision reporting to said defendant, Railroad Company, any facts or particulars with respect to said collision.

Also all printed rules and regulations of said Company prepared and issued by it and supposed to be in force and effect on said May 15, 1908, relating to or governing its engineers, conductors, station agents and telegraph operators with respect to the conducting and operating of trains locomotives over its railroad lines, including its printed rules and orders relating to the dispatching of trains from stations with respect to each other and with respect to dispatching trains from its various stations toward each other upon the same track.

S. GRANT HARRIS &
BENJ. MARTIN,
BENJAMIN MARTIN, JR.,
Attorneys for Plaintiff.

To the above named Defendant and to Clifford L. Jackson, Attorney for said Defendant.

Service of the above notice accepted this 14th day of March, 1910, but the right of the plaintiff to require the production of any or all of the books documents papers and evidence is not conceded.

CLIFFORD L. JACKSON,
Att'y for Def't.

Endorsed on back as follows: #329. State of Oklahoma. County of Muskogee. District Court. 3rd Judicial District. Ivolue B. West vs. Missouri, Kansas & Texas Railway Company. Notice to Produce. Due service of the within notice to produce is hereby admitted this — day of March, A. D. 1910. —, Attorney for Defendant. State of Oklahoma, County of Muskogee, Filed Mar. 29, 1910. W. P. Miller, District Clerk. S. Grant Harris and Benjamin Martin, Att'ys for Plaintiff.

That on the 29th day of March, 1910, the defendant filed herein its rejoinder to reply to defendant's third amended answer, which said rejoinder is in words and figures as follows: to wit:

139 In the District Court, Third Judicial District, Muskogee County, State of Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,
vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Rejoinder to Reply to Defendant's Third Amended Answer.

Comes now the defendant and for its rejoinder to the reply of the plaintiff to the third amended answer of the defendant, denies each and every material allegation therein contained.

CLIFFORD L. JACKSON,
J. G. ROLLS,

Attorneys for Defendant.

Endorsed on back as follows: No. 329. In the District Court, Third Judicial District Muskogee County, State of Oklahoma. Ivolue B. West, Plaintiff, vs. Missouri, Kansas & Texas Railway Company, Defendant. Rejoinder to reply to defendants Third Amended Answer. State of Oklahoma, County of Muskogee, filed Mar. 29 1910. W. P. Miller, District Clerk.

140 That on to-wit: the 29th day of March, 1910, the same being one of the regular judicial days of the February, 1910, term of the District Court of Muskogee County, Oklahoma, this cause came on for trial upon its merits, the plaintiff appearing in person and by her attorneys Benjamin Martin, C. H. Taylor and S. Grant Harris, and the defendant appearing by its attorneys, W. R. Allen and J. G. Rolfs, and thereupon twelve good and lawful men of the body of the said county of Muskogee, State of Oklahoma, were called, qualified and sworn to well and truly try the said cause, and thereupon the said plaintiff and defendant produced and examined the following witnesses in the following order, who testified as follows, to wit:

141 In the District Court for the Third Judicial District, State
of Oklahoma, County of Muskogee.

No. 329.

IVOLUE B. WEST, Plaintiff,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY CO., a Corporation,
Defendant.

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142 In the District Court for the Third Judicial District, State
of Oklahoma, County of Muskogee.

Hon. John H. King, Presiding.

No. 329.

IVOLUE B. WEST, Plaintiff,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY CO., a Corporation,
Defendant.

Be it Remembered, That on this 29th day of March, 1910, the
same being a regular day of the regular February, 1910, Term of
said Court, the above entitled and numbered cause coming on for

trial, and the plaintiff appearing in person and by counsel, Benjamin Martin, Esq., C. H. Taylor, Esq., and S. Grant Harris, Esq., and the defendant appearing by its attorney W. Ray Allen, Esq., and J. G. Ralls, Esq., and both sides announcing ready for trial a jury was called, duly empaneled and sworn to try the issues in this case, whereupon the following proceedings were had:

Mr. Taylor made opening statement to the jury on behalf of the plaintiff.

Mr. Allen made opening statement to the jury on behalf of the defendant.

143 Mr. ALLEN: We desire at this time to object to the introduction of any evidence in this case for the reason that the pleadings on the part of the plaintiff are not sufficient to support a cause of action against this defendant.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

IVOLUE B. WEST, the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. TAYLOR:

Q. State your name?

A. Ivolue B. West.

Q. Where do you live, Mrs. West?

A. Parsons, Kansas.

Q. How long have you lived there?

A. About 21 or 22 years.

Q. Are you the wife of William B. West referred to in the complaint?

A. Yes, sir.

Mr. ALLEN: Defendant objects to the question and answer, and asks that the answer be stricken.

Mr. TAYLOR: I consent to that.

Q. You are the plaintiff in this suit?

A. Yes sir, me and my children.

Q. Did you know William B. West, the deceased, who is referred to in the complaint in this action?

A. Yes sir.

Q. How long have you known him?

A. About 23 years.

144 Q. What relation were you to William B. West?

A. His wife.

Mr. ALLEN: Defendant objects to the question and asks that the answer be stricken for the reason that it is incompetent, irrelevant and immaterial, and not the best evidence.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

Q. (Question read by stenographer)?

A. His wife.

Q. When and where were you married?

A. Parsons, Kansas.

Q. Mr. ALLEN: Defendant objects to any testimony showing the marriage relation in this case for the reason that oral testimony from the witness is not the best evidence, and for the reason it is incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

Q. When?

A. 18—

Q. How many years ago?

A. 19 years ago.

Q. Have you lived together ever since as husband and wife?

A. Yes sir.

Mr. ALLEN: Defendant objects as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

145 Q. How many children, if any, have you and William B. West had?

A. I have four.

Q. What are their names, sex and ages?

A. Three girls and a boy.

Q. Which is the oldest?

A. The oldest girl is 17, Norma Harris West.

Q. And the second one?

A. The second one is a boy, 8, Glenford P. West.

Q. And the third one?

A. Wilmeta, and the baby is Ida Elizabeth.

Q. How old is Wilmeta?

A. Three.

Q. A girl?

A. Yes, sir, and the baby is a year and a half old.

Q. When was the baby born?

A. Six weeks after the accident.

Q. That is six weeks after the death of the father?

A. Mr. West, yes sir.

Q. And these children are all alive at the present time?

A. Yes sir.

Q. And they are all the children of William B. West?

A. Yes sir.

Q. How old are you, Mrs. West?

A. I am 38.

Q. How old was your husband at the time of his death?

A. 38 years, 5 months and 14th days.

Q. And what day did he die?

A. He died May 15, 1908.

146 Q. At the time of his death what was his occupation?

A. He was an American Express Messenger.

Q. Was he working for the American Express Company at that time?

A. Yes sir.

Q. In what capacity?

A. Messenger.

Q. Where?

A. In the express car.

Q. On what road?

A. Main line between Parsons and Dallas, Texas.

Q. On what road?

A. Missouri, Kansas & Texas.

Q. On the road of the defendant in this suit?

A. Yes sir.

Q. And on that day, the date of his death, May 15, 1908, where was he?

A. He was on his run between Parsons, Kansas, and Muskogee.

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

By the COURT: She perhaps doesn't know where he was at that time.

Q. At that time was he on his run?

A. Yes sir.

Q. Of course you don't know just where he was?

A. No sir, I don't know just exactly.

Q. When did you first hear of his death?

A. About one o'clock Friday, after dinner.

Q. What day was that?

A. May 15, 1908.

147 Q. And when did you first see his body?

A. The following Saturday about one o'clock; 1:30 to 2 o'clock.

Q. That is the next day?

A. Yes sir.

Q. Where did you first see it?

A. At home; the undertaker brought him out.

Q. How long had he been working for the American Express Company in this capacity?

A. Five years.

Q. And during all of that period had he been working on this same run?

A. Yes sir.

Q. What amount of wages; if you know, was he receiving during this period of five years?

A. He drew \$83.33 1/3.

Q. During all of that time?

A. No sir, the first part was \$80.00, then he got a three per cent raise.

Q. You mean \$80.00 per month?

A. Yes sir, and then a \$3.33 1/3 raise.

Q. Was that during the period of five years he was engaged in

this employment, how much of the time was he receiving \$80.00 per month, approximately?

A. Well, close on to two and a half or three years, as near as I can remember.

Q. And he was receiving \$83.33 $1/3$ per month from that time until the time of his death?

A. Yes sir.

Q. Was he employed by this same company prior to that time?

A. Yes sir.

148 Q. Whereabouts?

A. On the local trains.

Q. In what State?

A. The same State, on the Missouri, Kansas & Texas.

Q. On what line?

A. 1, 2, 3 and 4; on the same line but on 1, 2, 3 and 4 trains.

Q. What was the terminal points of that run?

A. Denison, Texas.

Q. From what point?

A. Parsons, Kansas.

Q. And during that employment, how much did he receive?

A. \$80.00.

Q. During all of that time ?

A. \$75.00 and \$80.00.

Q. And how much of the time was he receiving \$75.00 and how much \$80.00; about how much?

A. Just about the same as the other; from two and a half,—just about half of the time he run.

Q. How long was he on that line?

A. About four years I guess.

Q. And did he ever have any other employment with this Company, the American Express Company?

A. Yes sir, he was transfer clerk in the office.

Q. For how long?

A. About three or four years.

Q. At what point?

A. Parsons, Kansas.

Q. And during what period did he work in the office; well with respect to the time he began working on the main line, on the Katy Flyer?

149 A. He left the office and went on 1, 2, 3 and 4 and they moved us up to Sedalia, Missouri; then they cut the run in two and made the division at Parsons, Kansas, and Denison, Texas, and they brought him back and he run about two years on those trains, and then on the Flyer.

Q. Was he in the office between the time he went on the Flyer and the time he had employment on the other division?

A. No sir.

Q. Prior to that time he was in the office four years?

A. Yes sir, and prior to the time he was in the office he run between Parsons and Coffeyville, made two round trips a day.

Q. Was that in the State of Kansas?

A. Yes sir.

Q. What was the terminal points?

A. Parsons and Coffeyville, Kansas.

Q. What wages did he get during that time?

A. \$50.00.

Q. Do you know about what time he left that employment and went to working in the office?

A. About 16 years ago.

Q. Well what was his employment before he was on the Coffeyville branch?

A. He drove a wagon.

Q. Express wagon?

A. Yes sir, but that was for the Pacific.

Q. Another Express Company?

A. Yes sir, and the American bought them.

Q. Now at the time of his death what was the general condition of your husband's health?

A. Excellent.

150 Q. How large a man was he?

A. He was about five feet, six inches, and would weigh 168 to 170 pounds.

Q. And had he ever been sick?

A. No sir, only from an injury caused from the fall of a sample trunk in the express car that laid him off of duty.

Q. For how long?

A. About three weeks.

Q. So he never was sick of any disease?

A. No sir, he was not sick.

Q. Was he a strong man?

A. Yes sir.

Q. In good health at the time of his death?

A. Yes sir.

Q. Between what points, what were the terminal of his runs during his last five years?

A. Between Parsons, Kansas, and Dallas, Texas.

Q. Now Mrs. West, how much of the earnings of your husband was turned over to his family, to you and his children?

A. All of them.

Mr. ALLEN: The defendant objects as incompetent, irrelevant and immaterial.

By the COURT: Objection sustained.

Mr. TAYLOR: The plaintiff excepts.

Mr. ALLEN: I would like to have the answer stricken out.

Mr. TAYLOR: The plaintiff offers to show by this Witness that the earnings of the husband with the exception of a certain amount, were turned over for the support of his wife and children regularly for the purpose of showing the financial loss to the family from this source.

151 Mr. ALLEN: If the Court please, we would like to have the answer of the witness stricken.

By the COURT: The answer will be stricken.

Q. Mrs. West, outside of the earnings of your husband for the support of yourself and children, did you have any other source of income?

A. No sir.

Mr. ALLEN: We object on the grounds it is incompetent, irrelevant and immaterial.

By the COURT: Objection sustained.

Q. What means of support had you for yourself and your children?

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

Q. (Question read by stenographer)?

A. Outside, or while he was living?

A. Yes?

A. Not any.

Q. You mean not any outside of his earnings?

A. No sir.

Q. You have any other income from any source?

A. No sir.

Q. How much of this income derived from the earnings of your husband was necessary for the support of yourself and children?

A. All of it.

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

152 Q. And what portion of the earnings did he retain for his personal expenses?

A. Just about—

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

A. He held out from \$3.00 to \$5.00 for his expenses on the road during the month.

Q. Was any administrator ever appointed for his estate?

A. No sir.

Q. And for whose benefit was this action brought?

Mr. ALLEN: We object as a conclusion of law, and as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

Q. (Question read by stenographer).

A. For myself and four children.

Q. How many times had the wages of your husband been increased during your married life in his different employments?

A. About five.

Q. You never had any children other than these children by William B. West?

A. No sir.

Q. Now, Mrs. West, please state what the relations of your husband, with respect to his children, were, with respect to whether he gave them fatherly care and attention, or otherwise?

153 Mr. ALLEN: Defendant objects as incompetent, irrelevant and immaterial.

By the COURT: Objection sustained.

Mr. TAYLOR: The plaintiff excepts.

Q. I don't know but that you stated where was the place of your residence at the time of your husband's death?

A. Parsons, Kansas.

Q. And that was the place of residence of your husband?

A. Yes sir.

Q. And how long had you and your husband resided there?

A. About five years.

Q. And how long did you state that you resided in the State of Kansas all together?

A. 22 years; you mean he and myself?

Q. Yes?

A. 19 years.

Q. Then you resided in Kansas all of the time excepting the short time you were in Missouri?

A. Yes sir.

Q. How long were you in Missouri?

A. Eight months.

Q. How long ago was that, about?

A. Well at the time of the accident about six years.

Q. You have never removed since your husband's death?

A. No sir.

Q. And are the children still living with you?

A. Yes sir.

Q. And being supported by you?

A. Yes sir; they are all minor children.

Q. Has there ever been any personal representative or administrator appointed for your husband's estate?

154 A. No, sir.

Q. Take the witness.

Cross-examination by Mr. ALLEN:

Q. Upon the run, Mrs. West, that your husband had at the time of his death, what time would he leave home?

A. At 8:10 A. M. Did you mean from the house or station?

Q. I just meant leave the station?

A. He would leave the station at 8:10 A. M.

Q. And what time would he get back home to Parsons?

A. The next night at 7:45.

Q. Then he would be gone——?

A. He would be gone two days and one night.

Q. Then how long would he stay at home before leaving?

A. He would stay two nights and one day.

Q. Now his run you say was from Parsons to Dallas, Texas?

A. Yes, sir.

Q. And that run went through Oklahoma, State of Oklahoma?

A. Yes, sir.

Q. Mrs. West, your husband had laid off some shortly before this accident, hadn't he?

A. Yes, sir.

Q. You know Dr. Allison of Parsons?

A. Yes sir.

Q. And those gentlemen treated Mr. West, didn't they?

A. Yes, sir.

Q. Now didn't he treat him for rheumatism?

A. He stated the trouble was caused from the lick that he received in the express car.

Q. They treated him for rheumatism?

A. I couldn't tell; they never said.

155 Q. Didn't your husband say it was rheumatism?

A. No sir.

Q. Now before that time when had he laid off?

A. Very little; I don't know when it was; I couldn't tell you because it was very little he laid off.

Q. How long had he been working the last time before his death; that is, how long since he had laid off?

A. Four months.

Q. Do you remember how long he laid off and was under the Doctor's treatment?

A. About ten days I guess or two weeks.

Q. Were Mr. West's expenses allowed him when he was away from home for his meals and lodging?

A. No sir.

Q. He had to pay those out of his salary?

A. Yes sir; he carried his dinner both ways from home; I prepared his dinner both days, and he got his supper and breakfast at Dallas.

Q. Got his lodging at Dallas?

A. He slept in the express office when the weather was favorable.

Q. You mean when he went out on his run you fixed his dinner for him going down?

A. Going doing and the day coming back.

Q. He got his dinner at home the day he came back?

A. No sir; he carried his dinner on the train and ate it between Parsons, Kansas and Dallas.

Q. He got his dinner then down at Dallas?

A. No sir, I prepared it at home.

Q. You prepared two dinners for him then?

A. Yes sir.

Q. And he ate one one day and the other the next?

A. Yes sir.

156 Q. And he got his supper after he got back home?

A. Yes sir.

Q. You say he had been working at his salary of \$83.33, for about how long?

A. Well from two to two and a half years.

Q. That is the highest salary he had ever earned so far as you know.

A. Yes sir.

Q. That was the highest salary paid express messengers on that line?

Mr. TAYLOR: We object as calling for a conclusion.

By the COURT: She can answer if she knows.

(Question read by stenographer.)

A. South of here.

Q. And that was the run he was running on?

A. Yes sir, from Parsons to Dallas, Texas.

Q. That is all.

Redirect examination.

By Mr. TAYLOR:

Q. Then as I understand it he was at home one day and out two days?

A. Yes sir.

Q. And this salary was for two-thirds of his time then?

A. Yes sir.

Q. And did I understand you to say that the injury he was laid off two weeks for was caused by a trunk falling on him?

A. Yes sir.

Q. That is all.

(Witnessed excused.)

157 CHARLES R. DAIGH, being first duly sworn, testified as follows on behalf of the plaintiff:

Direct examination.

By Mr. TAYLOR:

Q. State your name?

A. Charles R. Daigh.

Q. How old are you, Mr. Daigh?

A. 37.

Q. What is your business?

A. I am in the grocery business.

Q. How long have you been in the grocery business?

A. Not quite two years.

Q. What was your business prior to that time?

A. Railroad conductor.

Q. Where were you employed prior to that time?

A. M., K. & T.

Q. How long were you employed by the M., K. & T.?

A. As a conductor?

Q. Yes?

A. About six years as conductor.

Q. What other employment did you have with the M., K. & T.?

A. Brakeman.

Q. Prior to that time?

A. Yes sir.

Q. How long were you employed as brakeman for the M., K. & T.?

A. About six years.

Q. Were you present at the time of the collision between the freight train and the passenger train, known as the Katy Flyer on the 15th day of May, 1908?

A. Yes sir.

Q. What was your employment on that day?

158 A. I was conductor on that freight train.

Q. On the same freight train that collided with the Katy

Flyer?

A. Yes sir.

Q. What was your run at that time?

A. I was running between Parsons and Muskogee.

Q. And who was your engineer and fireman?

A. James Lanahan was engineer, and Andrew Frazier was fireman.

Q. Who was the head brakeman?

A. G. D. Harper.

Q. And who was the rear brakeman?

A. Ira Land.

Q. What was the number of that freight train?

A. No. 412.

Q. And what was the number of the engine, do you remember?

A. No. 120.

Q. How long had you been running that train prior to the time of the accident as conductor?

A. I suppose about an hour, or not quite an hour, since I had taken charge.

Q. I mean how many years?

A. I had been running freight trains about six years.

Q. And where did you start from that day before the accident?

A. I started from Muskogee.

Q. The train was made up here?

A. Yes, sir.

Q. Were the fireman and engineer and brakeman that you refer to on your train that day?

A. Yes, sir.

Q. What time were you due to leave Muskogee?

A. I was called for 12 o'clock.

159 Q. Do you know what time you actually left?

A. It was between 35 and 45, I don't know the exact

minute.

Q. Between 12:35 and 12:45?

A. No, between 11:35 and 11:45.

Q. A. M.?

A. Yes, sir.

Q. Had you received any dispatch orders before you left Muskogee?

A. Yes, sir.

Q. How many of them?

A. I think there was three running orders, and two or three slow orders.

Q. Three running orders and two or three slow orders?

A. Yes, sir.

Q. Explain what running orders and slow orders are.

A. Well, the running orders relate to the meeting and passing of trains, and the slow orders refer in effect to moving the train only in regard to bad track.

Q. That is the slow orders are directions as to what spot to run the train at certain points?

A. Yes, sir.

Q. And had nothing to do with the meeting and passing of trains?

A. No, sir.

Q. The running orders had to do with the meeting and passing of trains?

A. Yes, sir.

Q. Do you remember the numbers of those running orders that you received?

A. There was a 34 and a 36.

Q. 33?

A. And a 33.

160 Q. Have you those orders or copies of them?

A. No, sir.

Q. What did you do with them?

A. The company has them.

Q. Now Mr. Daigh, after you left Muskogee, what direction did you go?

A. North.

Q. And what was the other terminal to which you were headed?

A. Parsons, Kansas.

Q. Now, did you, after leaving Muskogee, meet any obstruction on the track?

A. Yes, sir.

Q. What was it?

A. No. 5.

Q. What is No. 5?

A. Passenger train known as the Katy Flyer.

Q. That goes from what point; what is the terminal of that?

A. St. Louis.

Q. Do you know the other terminal to which it was going?

A. Galveston.

Q. Do you know how many cars you had in your freight train on that day, May 15, 1908?

A. I think it was 38.

Q. And what did those freight cars consist of?

A. Well some lumber, and I couldn't recollect what they had in them.

Q. Were they flat cars or box cars or what?

A. Well, I had box cars and empty refrigerators and some else; it was a mixed train.

Q. Was there a dead engine in the train?

A. Yes, sir.

161 Q. And in mentioning 38 cars on the train do you include the caboose?

A. No sir.

Q. 38 cars besides the caboose?

A. Yes sir.

Q. And besides the engine and tender?

A. Yes sir.

Mr. ALLEN: Have you your train book?

WITNESS: No sir, it is up in Mr. Watts' office.

Mr. ALLEN: Did you have it the day you gave your deposition at Parsons?

WITNESS: No sir, you produced it and I returned it to you.

Q. Now do you know of what No. 5, the Katy Flyer, passenger train, was made up of?

A. Passenger coaches.

Q. All passenger coaches?

A. Yes sir.

Q. That is a limited train, is it?

A. Yes sir.

Q. And do you know how many passenger coaches there were on that day.

A. No sir.

Q. Were you acquainted with Mr. William B. West, the express messenger?

A. Well I have seen the man, and I guess I talked to him in my life time.

Q. That is you had met him before the accident?

A. Yes sir, I had met the man.

Q. Now at what point did you meet this passenger train?

A. About a half mile south of the Arkansas River bridge.

162 Q. And what is the grade at that point?

A. What per cent?

Q. No, I mean whether it is up grade or down grade?

A. It was down grade.

Q. Down grade in which direction?

A. North.

Q. That is from the point of the collision north toward the Arkansas River bridge it was down grade?

A. Yes sir; well there is a little bit of a slip I think from the bridge. I think for a little ways, but it was down hill right where the collision was.

Q. And how far south of the point of collision did the grade start?

89

A. About a half mile, I guess.

Q. Then you had been running about a half mile down grade before you struck the passenger train?

A. Yes sir.

Q. For how far,—first I will ask you where were you riding on that freight train that day?

A. I was in the caboose cupola.

Q. In the cupola?

A. Yes sir.

Q. Were you looking ahead?

A. Well, I looked up when the air went into emergency?

Q. You say you looked up when the air went into emergency?

A. Yes sir.

Q. About where were you at the time that the air went into emergency with respect to the point of collision?

A. Well I suppose we were not quite a half mile from where it occurred.

163 Q. And you were going north?

A. Yes sir.

Q. The passenger train was going south?

A. Yes sir.

Q. About how far was that point of collision from Muskogee.

A. You mean from the north yards?

Q. Well say from the north yards first?

A. About two miles, probably not that far; no it wasn't that far.

Q. Well was it about that?

A. About a mile and a quarter I expect.

Q. The point of collision was about a mile and a quarter north of the north yards?

A. Yes sir.

Q. Did your train start at the north yards?

A. Yes sir.

Q. And where was it made up?

A. In the north yards.

Q. And how far was the north yards north of the central part of Muskogee?

A. Well they extend clear up in to Muskogee.

Q. Well at the point that you stopped in the north yards, how far is it to Muskogee?

A. About three quarters of a mile, probably a mile.

Q. So that the point of collision was about two miles then from the center of Muskogee?

A. Well it is further than that, two miles to two and a half, the best of my judgment of course.

Q. About how long after you left the north yards with your train did you collide with the passenger train?

A. I couldn't say just exactly.

164 Q. Four or five minutes?

A. Yes sir, longer than that I think; we pulled out of the yards a little—probably eight minutes.

Q. About what rate of speed were you going when you noticed the emergency brakes thrown on and looked up?

A. About 20 or 25 miles an hour.

Q. And when you looked up what did you see?

A. Saw the smoke of a train coming out of the Arkansas River Bridge.

Q. Could you see the engine itself?

A. Well, I saw the engine, yes sir.

Q. As it was coming out of the bridge?

A. Well the engine was out of the bridge and most of the train.

Q. And what was the effect of the emergency brakes on your train?

A. Why it had a tendency to immediately stop me.

Q. And about how far did you run before you collided with the passenger train from the time when you first looked up and saw the train coming through the Arkansas bridge?

A. We ran a little farther than our train length; a little over 40 cars I should judge.

Q. And about how long were the cars?

A. Different lengths, 34 to 40 feet.

Q. The freight cars differ from 34 to 40 feet?

A. Yes sir.

Q. So that if the cars had all been 40 feet and there was 40 of them, it would be about 1600 feet you ran after you first felt the emergency brakes, and is there anything at the point of collision to indicate it, road crossing or anything like that.

A. Yes, sir, there is a road crossing there some place.

165 Q. About how close to the point of collision is that?

A. Well I couldn't say.

Q. You know it is right in close there?

A. Yes sir, I know there is a crossing close there some place.

Q. Is that a private road crossing?

A. No, I couldn't say whether it is private or public.

Q. Can you identify the exact point of the collision with respect to this road crossing?

A. I don't know, I haven't been there since.

Q. About how fast was your freight train running at the time of the collision?

A. Between 12 and 15 miles an hour.

Q. Then you had slowed it down from about 25 to about 12 and 15 miles?

A. Yes sir.

Q. In running 1600 feet with 40 cars?

A. Yes sir.

Q. At the time of the collision what occurred?

A. Well the two engines were demolished and several cars.

Q. Any cars of your train demolished?

A. Yes sir.

Q. How many?

A. I couldn't tell you exactly without my train book, I don't remember; 5 or 6.

Q. And do you know how many of the passenger cars were demolished?

A. No sir; I think there was two or three.

Q. About what rate of speed was the passenger train going at the time of the collision?

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection sustained, unless he knows.

166 Q. Did you notice; when you looked up after you felt the emergency brakes come on and saw the engine coming out of the bridge, did you observe the wheels going?

A. Not until they came from behind a clump of bushes.

Q. Well that was almost right-a-way?

A. That was just before the collision.

Q. Did you observe at that time how fast the passenger train was going?

A. Well just in my own estimation I judged the speed.

Q. Well you have been a railroad man all your life?

A. Yes sir.

Q. What rate of speed did you estimate that train was going?

A. Near about 40 miles an hour.

Q. And that was immediately before the collision was had?

A. Yes sir.

Q. Did you observe whether or not from the time you first saw it coming out of the Arkansas bridge to the point of collision it slowed down appreciably?

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

Q. (Question read by the stenographer.)

A. I couldn't say positively that I did.

Q. I suppose you watched it all the time, didn't you, after you first saw it?

A. I watched both trains.

Q. And I suppose you were expecting to see it stop, weren't you?

A. No sir, I didn't expect it to stop after it came from behind those bushes; I knew that it wouldn't stop in that distance.

167 Q. What was your judgment as to whether the train was slowing up or not?

Mr. ALLEN: Defendant objects as calling for a conclusion.

By the COURT: He can state what the train did in that time, if he knows.

Q. Well what did it do in that time, from the time you first saw it coming out of the Arkansas bridge until it reached the point of collision, the passenger train?

A. Well it kept on coming.

Q. As to the rate of speed, did it slow down at all?

A. Yes, it slowed down some; you see I couldn't tell it was coming almost toward me and that is a mighty hard question to answer.

Q. Do you know the number of the passenger train?

A. No. 5.

Q. And what was the number of the engine?

A. 312 I think.

Q. I will call your attention, Mr. Daigh, to this paper and ask you what that is?

A. That is 31 train order.

Q. What do you mean by 31 train order?

A. It is an order issued to a superior train in regard to the movement of inferior trains, their leaving and in regard to meeting and passing.

Q. What do you mean by 19 train order?

A. It is an order issued to an inferior train leaving them against a superior train.

Q. Then a 31 train order is an order relating to the movement of the train?

A. Yes sir.

168 Q. Did you receive that order?

A. Yes sir.

Q. What is the number of that?

A. No. 33.

Q. Did you receive that before you left Muskogee on the 15th day of May, 1908?

A. Yes sir.

Q. That is one of the three orders you referred to?

A. Yes sir.

Mr. TAYLOR: I ask to have that marked as Plaintiff's Ex. No. 1.

Mr. ALLEN: We object because it is incompetent, irrelevant and immaterial.

Mr. TAYLOR: I was just having it marked, I hadn't offered it.

Q. Now, Mr. Daigh, I now call your attention to the next sheet and ask you what that is?

A. Another 31 train order.

Q. That order also relates to the movement of the trains on that day?

A. Yes sir.

Q. What is the number of that order?

A. 34.

Q. Now I will turn to the next sheet and ask you what that is?

A. It is another 31 order.

Q. That also relates to movement of the trains on that day?

A. Yes sir.

Q. And what is the number of that order?

A. 36.

169 Q. Those three train orders that I have shown you were the three orders you refer to relating to the movements of trains that you received at Muskogee that day?

A. Yes sir.

Mr. TAYLOR: Now I will offer all of these three train orders in evidence, and stipulate with counsel, subject to his objection that they are incompetent, irrelevant and immaterial, that they may be copied by the stenographer and the copies go in in place of the originals.

Mr. ALLEN: That is satisfactory, of course we desire to object on the ground that they are incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

Q. Now Mr. Daigh, I will ask you what the first order, I will call your attention to train order No. 33 and ask you what that order relates to and explain that?

A. In regard to the movement of my train.

Q. Yes?

A. Probably I had better — the whole order before I explain it.

Q. Very well?

Mr. ALLEN: I think it would be more regular to let the order be read to the jury; of course when they are introduced in evidence they explain themselves.

170 Q. Then I will request the witness to read the order?

A. "Train order No. 33. Parsons 5/15 1908. To 2nd 404 & No. 412 2nd 404 eng. 562 will wait at Gibson until 11:50 A. M. for Exa 584 South. Exa 584 South has right over No. 412 eng 120 to Muskogee. EMG. Conductor and Engineman must each have a copy of this order. Repeated at OK 10:50 A. M. Conductor Murphy, Daigh Train 2/404 412 Made. Comp. Comp. Time 10:50 A. 11:26 A. Operator Cully. Cully."

Q. Now when did you receive that order?

A. At 11:26.

Q. What does that first train designated as 404 engine 562 refer to?

A. With reference to a train that has gone ahead of me.

Q. In what direction?

A. North.

Q. Going north?

A. Yes sir.

Q. And do you know how long before you left?

A. They received that order at 10:50.

Q. And you didn't leave until about 11:35?

A. Between 11:35 and 11:45.

Q. What is the other there refer to in that order, 384,—extra 584 south refer to?

A. That gives that extra 584 south the right over No. 412, my train, to Muskogee.

Q. And that train was coming from the north into Muskogee?

A. Yes sir.

Q. When did you receive that order?

A. 11:26.

Q. And did that train arrive at Muskogee before you went out?

A. Yes sir.

171 Q. How long before?

A. We left upon its arrival.

Q. You left immediately upon its arrival?

A. Yes sir.

Q. Now refer to train order No. 34, I will ask you to read that to the jury?

A. "No. 5 eng 312 will wait at Wagoner until 11:45 A. M. for 2nd 404 eng 562 and will run 40 mins. late Wagoner to Muskogee."

Q. Does that relate to your train?

A. Only in regard to it being 40 minutes late.

Q. The train numbers on there do not refer to your train?

A. No sir.

Q. What was the number of your train?

A. 412.

Q. 404 engine 562 is not your train?

A. No sir.

Q. But the train referred to that would run 40 minutes late from Wagoner to Muskogee is which train; is the passenger train?

A. Yes sir.

Q. That is No. 5?

A. Yes sir.

Q. When did you receive that order?

A. I couldn't tell without looking at it?

Q. Excuse me? (Hands witness paper.)

A. 11:26.

Q. That was a few minutes before you left Muskogee?

A. Yes sir.

Q. That order as I understand it indicates to you that the Katy Flyer, No. 5, Engine 312, would leave Wagoner coming south toward Muskogee 40 minutes late?

A. Yes sir.

172 Q. What time was the passenger train No. 5 due to leave Wagoner?

A. I don't remember.

Q. (Hands witness train sheet.)

A. Due out of Wagoner at 10:59.

Q. What time would it leave there if it ran 40 minutes late?

A. 11:39.

Q. Now, Mr. Daigh, I will refer to train order No. 36, the next one, just read that to the jury?

A. "No. 403 eng 614 will wait at Verdard until 12.45 P. M. for No. 412 eng 120."

Q. That is order No. 36, is it?

A. Yes sir.

Q. To what trains did that relate?

A. My train and a freight train coming south.

Q. The freight train that came into Muskogee just before you left?

A. No sir.

Q. What train coming south?

A. No. 403.

Q. Where was that train?

A. It was to wait at Verdark until 12:45 for me.

Q. And that is what that order indicates to you, that that train is to wait for your train at Verdark?

A. Yes sir.

Q. About how far north of Muskogee is Verdark?

A. About four and a half miles.

Q. And about how far north of the Arkansas River bridge?

A. About a mile I guess.

Q. And there is no dispatching station at Verdark, is there, telegraph office?

A. Yes sir.

Q. Was there then?

A. There was at that time, yes, sir.

173 Q. And how far north of Verdark is Wagoner, next station?

A. No sir. Ask that question again?

Q. How far north of Verdark is Wagoner, about?

A. 9.2 miles.

Q. 9.2 miles north of Verdark?

A. Yes sir.

Q. And how far is Wagoner north of Muskogee?

A. Just a little over 17 miles.

Q. Now Mr. Daigh, referring to those three running orders which you received that day before you left Muskogee, I will ask you if any of those were violated?

A. Yes sir.

Q. Which one?

A. No. 34.

Q. In what respect was that order violated?

A. Well I left Muskogee when I didn't have time to leave in regard to the time leaving here.

Q. Is that what they call leaving on another train's time?

A. Yes sir.

Q. On what train's time did you leave Muskogee?

A. No. 5.

Q. And why does that order show that you violated it?

Mr. ALLEN: We object to that question.

Mr. TAYLOR: I will withdraw it.

Q. And did you give the order to leave Muskogee that day?

A. I gave one to the engineer.

Q. I mean you gave the order to pull out of Muskogee going north?

A. Yes sir.

174 Q. After receiving this order?

A. Yes sir.

Q. Did you see Mr. West in the wreck after this collision?

A. No sir.

Q. Was your train made up here at Muskogee?

A. Yes sir.

Q. Is there any rule of the railroad company with respect to the speed of freight trains when there is a dead engine in them?

A. Yes sir.

Q. What is that rule?

Mr. ALLEN: I am not objecting because it is not the best evidence, but we are objecting because if they had the best evidence it would be incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

Q. (Question read by stenographer.) As to the speed of your running your freight trains when there is a dead engine in them?

A. 15 miles an hour, engine not taken down.

Q. Was this engine taken down?

A. Yes sir.

Q. Well what speed were you allowed to run when it was taken down?

Mr. ALLEN: We object because it is incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

Q. (Question read by stenographer.) That is, is there any rule in respect to that when it is taken down?

A. I couldn't say for sure.

175 Q. What did you do immediately after the collision?

A. Went to the head end of my train where the collision was.

Q. And then what did you do?

A. I returned to Muskogee.

Q. And what did you do there?

A. Well on my way back to Muskogee I stopped at the stock yards and phoned to the north yards office that I had had a collision.

Q. And you sent word for assistance?

A. Yes sir.

Q. Did you go upon the relief train that went up from Muskogee?

A. No sir.

Q. And you didn't wait there until the relief train came up?

A. No sir.

Q. Do you know about what time it was that you got back to the north yards station where you telephoned the stock yards, station where you telephoned?

A. I don't think I looked at my watch, I would not say positive.

Q. I will call your attention once more Mr. Daigh to the question I asked you about the distance from Muskogee to Wagoner; you stated I think that it was about 17 miles, will you look again and see if you were correct?

A. It is about 15 miles; it is my mistake, I counted from Lilly-stn.

Q. 15 miles?

A. Yes sir.

Q. That is all.

Cross-examination by Mr. ALLEN:

Q. I believe you say you were conductor on this train 412?

A. Yes sir.

Q. Do you remember whether or not you had any loaded cars
cars of freight destined to points either in the State of Kansas or
Missouri?

176 A. Yes sir.

Q. Were those cars in your train on leaving Muskogee?

A. Yes sir.

Mr. TAYLOR: If these questions are directed toward the matter
of Interstate Commerce I object to them as incompetent, irrelevant
and immaterial.

Mr. ALLEN: I will say frankly to the Court that we expect to
prove the Interstate movement of the freight train.

By the COURT: Objection sustained for that purpose.

Mr. ALLEN: The defendant excepts.

Q. I will ask you Mr. Daigh, if there was any irregularity in the
orders which you received for the movement of your train; in other
words, were they proper orders?

A. Yes sir.

Q. If the orders had been observed would there have been a col-
lision?

A. No sir.

Q. Who was responsible for that collision?

Mr. TAYLOR: That is objected to as calling for a conclusion of
the witness and immaterial and incompetent.

By the COURT: Objection sustained.

Mr. ALLEN: The defendant excepts.

Q. Do you know Mr. Daigh, who was responsible for that col-
lision?

Mr. TAYLOR: Same objection.

By the COURT: Objection sustained.

Mr. ALLEN: The defendant excepts.

Q. Do you know by whom those orders were violated?

Mr. TAYLOR: That is objected to on the same grounds, and also
on the grounds that he gave the order which violated the rule.

177 By the COURT: Objection overruled.

Q. (Question read by stenographer.)

A. Yes sir.

Q. By whom were they violated?

A. Myself and my engineer.

Q. The engineer I believe you say had a copy of the orders the
same as you did?

A. Yes sir.

Q. And they were violated equally by him and by you?

A. Yes sir.

Q. Was there on your part any wilful or intentional violation of those orders?

Mr. TAYLOR: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection sustained.

Mr. ALLEN: The defendant excepts.

Q. Was there as to the engineer any wilful or intentional violation of those orders?

Mr. TAYLOR: We object as calling for a conclusion and as incompetent, irrelevant and immaterial.

By the COURT: Objection sustained.

Mr. ALLEN: The defendant excepts.

Mr. ALLEN: We desire to show by this witness that there was no wilful and intentional violation of the orders which occasioned the injury.

Q. Do you know how it happened, Mr. Daigh, that the order was violated?

Mr. TAYLOR: That is objected to as incompetent, irrelevant and immaterial.

178 By the COURT: Objection sustained.

Mr. ALLEN: The defendant excepts.

Mr. ALLEN: We want to show by this witness that the reason for the violation was not gross negligence—no gross negligence involved in its violation.

Q. That is all.

(Witness excused.)

E. T. GILLEY, being first duly sworn, testified as follows on behalf of the plaintiff:

Direct examination by Mr. TAYLOR:

Q. State your name?

A. E. T. Gilley.

Q. Where do you live?

A. 406 North F. Street, Muskogee.

Q. How long have you lived in Muskogee?

A. Five years.

Q. What is your business?

A. Photographer.

Q. Do you know of the wreck of the M. K. & T. train this side of the Arkansas bridge which occurred May 15, 1908?

A. Yes sir, I was there.

Q. Did you take photographs of that wreck?

A. Yes sir.

Q. Now Mr. Gilley, I will show you this photograph?

A. Yes sir.

Q. And also this one and ask you if those are two of the photographs that you took of that wreck?

A. Yes sir, I took both of them.

179 Mr. TAYLOR: I will ask to have them both marked, one Plaintiff's Ex. No. 2 and the other No. 3.

(Same were marked by the stenographer.)

Q. Now Mr. Gilley, referring to the photograph marked plaintiff's Ex. No. 2, I will ask you if that is one of the photographs that you took of the wreck?

A. Yes sir.

Mr. ALLEN: We object to that as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

A. Yes sir.

Q. When did you take that?

A. That was taken about a half hour after the collision.

Q. What time did you hear of the collision?

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection sustained.

Q. About what time of day did you take that photograph?

A. That was about 12:30.

Q. On what day?

A. 15th day of May.

Q. 1908?

A. Yes sir.

Q. From which side of the railroad track was that taken there?

A. This was taken from the west side, looking east.

Q. How long were you up there at the wreck?

A. I was up there until four o'clock.

Q. And did you while you were there observe any dead bodies?

A. Only one and he was covered with a sheet; I just passed by.

180 Q. And where was that body lying with respect to this photograph?

A. Well, it was outside, on the other side, I presume it was over about here on the opposite side of this.

Q. Instead of showing here——?

A. Over on the opposite side of the wreck from this view.

Mr. ALLEN: We object to this line of testimony for the reason it is unfair; if they are going to introduce the photograph now is the time to do it so we can save our record.

Mr. TAYLOR: I will withdraw that question.

By the COURT: All right. Objection sustained.

Q. Now Mr. Gilley, I will show you the photograph marked plaintiff's Ex. No. 3 and ask if that was taken at the same time?

A. Yes sir.

Q. About what time of day?

A. About 12:30 they were taken. About five minutes apart.

Q. From which side of the railroad track was plaintiff's Ex. No. 3 taken?

A. That was taken from the east side.

Q. Looking toward the West?

A. Yes sir.

Q. Mr. TAYLOR: The photographs are offered in evidence.

Mr. ALLEN: Defendant objects to the photograph which has been marked Plaintiff's Ex. No. 2 for the reason it is incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

Mr. ALLEN: Defendant objects to the photograph offered in evidence marked Plaintiff's Ex. No. 3, for the reason it is incompetent, irrelevant and immaterial.

181 By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

Q. Now referring again, Mr. Gilley, to plaintiff's Ex. No. 2, I will ask you with respect to that photograph, where the body was lying that you referred to?

Mr. ALLEN: We object to that as incompetent, irrelevant and immaterial; they never have identified who this body is.

By the COURT: I think perhaps you had better show what body it is.

Mr. TAYLOR: To save any lengthy proceedings, I would like to ask counsel if they deny that Mr. West, the messenger, was killed in the wreck?

Mr. ALLEN: We will admit that there is no reason to deny the fact that Mr. West was killed up there in that collision.

By the COURT: Very well then, the objection will be sustained.

Q. That is all.

Mr. ALLEN: At this time in view of the admission made by the defendant that Mr. West was killed in this collision we ask that the photographs introduced in evidence and numbered plaintiff's Ex. No. 2 and 3 be stricken from the record as incompetent, irrelevant and immaterial.

By the COURT: Motion overruled.

Mr. ALLEN: The defendant excepts.

Mr. ALLEN: No questions of this witness.

(Witness excused.)

182 JESSE W. EMORY, being first duly sworn, testified as follows on behalf of the plaintiff.

Direct examination by Mr. TAYLOR:

Q. State your name?

A. Jesse W. Emory.

Q. Where do you live, Mr. Emory?

A. Parsons, Kansas.

Q. How old are you?

A. 48.

Q. And how long have you lived at Parsons?

A. About 14 years.

Q. What is your business?

A. I haven't got any at the present time.

Q. What was your business on the 15th day of May, 1908?

A. I was locomotive fireman.

Q. On what train?

A. On 5 and 8, Parsons to Muskogee.

Q. Those were trains locally known as the Katy Flyer?

A. Yes sir.

Q. On the main line of the Missouri, Kansas & Texas?

A. Yes sir.

Q. Were not those trains 5 and 6 instead of 5 and 8?

A. 5 and 8 at that time.

Q. Not then known as 5 and 6?

A. Well I came down on 5 and I would go back on 8; I had been on 5, 6, 7 and 8, and when 8 was put on, the oldest crews had preference and we *taken* 5 south and 8 north.

183 Q. Well on that day, May 15, 1908, you were fireman on what train?

A. On No. 5.

Q. No. 5, going south?

A. Yes sir.

Q. Were you on this train at the time of the wreck?

A. Yes sir.

Q. Or until just before the wreck?

A. Yes sir.

Q. Now Mr. Emory, I will ask you about where,—I will ask you to state to the jury all the circumstances connected with that collision as you know them?

Mr. ALLEN: We object to that question, as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

A. Well, how was that question?

Q. Just state all the facts in regard to it?

A. Well at the time of this accident I had been on that run for a number of years, and always when the engine came out of the south end of the Arkansas bridge I would put coal in the fire to run the hill to Muskogee; on this morning of May 15th just the same as it had always been, just as the engine came out of the south end of the Arkansas bridge I gave it a bunch of coal, and as I threw in the second scoop of coal Mr. Hotchkiss applied the air in the service application.

Q. Who is Mr. Hotchkiss?

A. The engineer.

Q. You say the engineer applied the air in the service application?

A. Yes sir.

184 Q. What do you mean by a service application?

Mr. ALLEN: We object to that as incompetent, irrelevant and immaterial, and for the further reason the witness has not qualified.

By the COURT: Qualify him.

Q. How long had you worked for the Company prior to the time of the accident?

A. About 11 years.

Q. And how long had you been on this particular run prior to the accident.

A. Something like 5 years before this accident. I had been a locomotive fireman for 9 years.

By the COURT: Objection overruled that he is not qualified.

Mr. ALLEN: I make general objections also that it is incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

Q. State to the jury what is meant by service application of the air?

A. Service application is to slow down, or something, and the way he applied the air I supposed there was some stock or something on the track, and was to slow down a little to give them a chance to get off.

Mr. ALLEN: We object to that part of his answer as to what he supposed.

By the COURT: Objection sustained; state what is meant by service application.

185 A. Well it is to slow down a little bit.

Q. Well what is it to distinguish from emergency?

A. Well to apply the air in emergency is to set all the brakes at once and it stops with a jerk.

Q. And what is a service application?

A. Well it is a gradual slow stop.

Q. Now go on and state what else the engineer did?

A. Well when I threw this second scoop of coal in he applied the air in service application, and I was putting in the fire and I stopped and looked up at him to know what he meant; I never felt the shock of that air on my feet at all, simply heard him make the application, and he was standing up in his cab looking forward from the cab window, and he reached up and grabbed the whistle cord and whistled three short blasts of the whistle, and turned and come down in the deck of the engine and never spoke or said a word, and as he came down I went to my window on my side, and my side was on the outside of that curve and I had to lean out and I could see just about 8 or 10 inches of the east corner of the pilot and I sprung back to my gang way and jumped from the top step; and I don't

know whether I turned facing Mr. Hotchkiss or the other way, but I know I never seen him any more until he was on the ground.

Q. Well now did the engineer after he blew those three short blasts of the whistle do anything else to the engine?

A. No sir.

Mr. ALLEN: We object as incompetent, irrelevant and immaterial for the reason the witness has shown himself disqualified; he did not see him any more.

By the COURT: He can state what he did until he jumped off of the engine.

186 Q. After he blew three blasts of the whistle what did he do?

Mr. ALLEN: We have no objection to that.

By the COURT: If this took place before this man jumped off the objection is overruled. I don't know whether he did or not.

Q. Now Mr. Emory before ever that you jumped,—first I will ask if you jumped off of the engine finally?

A. Yes sir.

Q. Before you jumped off and after the engineer blew the three short blasts of the whistle, what, if anything, did he do with respect to the engine, outside of the putting the service application on as you have stated and blowing the whistle three times?

A. He didn't do anything, only when he blew those three short blasts of the whistle and I was standing there as I had been putting in the fire, he turned and stepped down in the gang way, deck of the engine, and as he come into the deck of the engine I went to my cab window to see what was wrong and after I seen the pilot coming around the curve I never seen him any more, but he couldn't have got back there and got off of that engine.

Mr. ALLEN: We object to the last part of the answer as a conclusion.

By the COURT: Objection sustained.

Q. Did he, after he came down into the deck of the engine, go back to the engine while you were on the engine?

A. No sir.

Q. And after he came down you went up and looked out of the window before you jumped off?

A. Yes sir.

187 Q. How long after you went and looked out of the window was it before you jumped off?

A. O, it was mighty quick; I was quick and active, I had to get off quick or I would not have got off at all.

Q. When you looked out of the window, how far were you from the freight train that you collided with?

A. I judge about six car lengths.

Q. And with respect to the throttle how was it when the engineer left the engine, if you know?

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

By the COURT: If he knows he may state.

Mr. ALLEN: The defendant excepts.

A. I have had experience as nine years as a locomotive firemen.

By the COURT: Do you know what the condition was?

Q. (Question read by stenographer.) How was that, Mr. Emory, after he came down into the deck of the engine; did he jump off of the engine?

A. I didn't see him jump but he must have jumped off.

By the COURT: Don't state that Mr. Witness, just state what you know.

Q. Where did he go, if you know, after he came down into the deck of the engine?

A. When he came down into the deck of the engine he started through the gang way and I went to my cab window to see what was wrong, expected to see stock or something.

Q. Now from the deck of the engine where he came down, how far was he from his throttle and air valve and so on?

A. From the deck of the engine on that engine; this throttle was a ratchett throttle—

188 Q. How far, when he came down into the deck of the engine, how far was he from his throttle of the engine?

A. Well he must have been, I would judge, when I passed him in the gang way, at least 5 or 6 feet from the throttle.

Q. Now at that time state if you know how the throttle was left?

A. The throttle was still working steam.

Q. That is it was open?

A. It was partly open, yes sir.

Q. And was that engine supplied with an emergency air brake?

A. Yes sir.

Q. Did he at any time before he left the engine go down into the deck of the engine,—apply the emergency brake?

A. No sir.

Q. Is that engine equipped with sand supply for slowing an engine on the track?

A. Yes sir.

Q. Did he turn on the sand before he come down?

A. No sir.

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

Q. And I think you stated that he did not go back to his throttle before you jumped off?

A. Yes sir.

Q. Did you see him any more after he came down into the deck of the engine?

A. On the ground?

Q. I mean before you jumped?

A. No.

189 Q. After the wreck was over you mean you saw him on the ground?

A. Yes sir, on the ground after it was over.

Q. Now you say that you have been a fireman on an engine for nine years?

A. Between 8 and 9 years.

Q. And how long had you run with this engineer that was on the train that day, Hotchkiss?

A. Something like five years.

Q. And is a fireman familiar with the workings of the engine?

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

Mr. TAYLOR: I will withdraw the question.

Q. Were you familiar with the portions of the engine, Mr. Emory?

A. Yes sir.

Q. From your experience with the engineer as a fireman during this period?

A. Yes sir.

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

Q. Did you ever run an engine?

A. I have run them, moved them at stations and water tanks, have run them around on different tracks and take water and coal.

Q. And in case the engineer should have been away or become incapacitated on a run who would take charge of the engine?

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection sustained.

Mr. TAYLOR: The plaintiff excepts.

190 Q. Now Mr. Emory you said that you were just coming out of the south end of the Arkansas bridge when he first applied this service air, how far is that from the place of the collision?

A. Well it is something like a half mile from the bridge.

Q. About how fast was this train running coming across the bridge?

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

A. Well, I would judge we were going 50 miles an hour.

Q. About how fast was it running at the time of the collision?

Mr. ALLEN: We object as incompetent, irrelevant and immaterial, because he jumped off, he said, way up above the collision.

Q. At the time you jumped off about how fast was your train going?

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

A. Well our train was going over 40 miles an hour, from 40 to 45 miles an hour.

Q. Then in running this half mile the train had only slowed down from about 50 to about 40 miles?

A. Yes sir.

Q. If the engineer had applied the emergency air brakes and shut off his throttle and applied the sand when he first put on the service brake, how long would it have taken, how far would that train have run before it came to a stand still?

191 Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

Q. If you know?

A. Yes sir, I think I have a good judgment of it.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

Q. How far?

A. We could have stopped within 1,000 feet.

Q. Did you state that the engine was equipped with sand for stopping?

A. Yes sir.

Q. As far as you know were all of the appliances in working order?

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

A. Yes sir.

Q. Was that from the time you left the south end of the bridge until you arrived at the place of collision, about a half mile, is that up grade or down grade going south toward the place of collision?

A. Just leaving the bridge I think it is just a sort of a dip and then it starts around the curve and up grade and up grade where we hit.

Q. About how much of a grade is that, if you know, from the bridge up to the place of collision?

A. No, I don't know; it is a little up grade but I couldn't tell.

Q. Now you speak of the curve, how much of a curve is that?

A. I couldn't say that either, but it is a curve; a curve to the right.

192 Q. It curves to the right going south?

A. Yes sir.

Q. And is it a sharp curve or a long curve?

A. Well I have seen shorter curves and longer, it is just a medium curve to the right.

Q. Is that line there a single track or a double track line?

A. It is a single track line.

Q. Do you know what train that was that you collided with?

A. No sir, I don't know the number of it; it was a freight train.

Q. And in which direction was that train going?

A. It was going north.

Q. Going toward you?

A. Yes sir.

Q. And on the same track?

A. The same track.

Q. And could you at the time you looked out there, could you estimate the speed that train was coming toward you?

Mr. ALLEN: We object as incompetent, irrelevant and immaterial.

Mr. TAYLOR: I will withdraw that question.

Q. That is all.

Cross-examination by Mr. ALLEN:

Q. Mr. Emory, you didn't see Mr. Hotchkiss leave the engine, did you?

A. As I say we passed one another in the deck of the train.

Q. Wait a minute, I want you to answer my question, now did you see him get off of the engine?

A. No sir.

193 Q. You don't know when he left the engine, do you?

A. I know when he come down in the deck and come back through the gang way.

Q. You don't know when he left the engine?

A. No sir.

Q. Now when you jumped off of the engine where did you go after you got up?

Mr. TAYLOR: That is immaterial and not proper cross-examination.

By the COURT: Objection overruled.

Mr. TAYLOR: The plaintiff excepts.

A. How was that question?

Q. Which direction did you go after you jumped off of the engine?

A. Well I jumped off on the east side.

Q. On the east side?

A. Yes sir.

Q. You say that was about six car lengths north of the wreck, or where the engines met?

A. No sir, I say when I first saw it, it was about six car lengths apart, and then I sprung into my gang way and jumped as quick as I could; I judge we were about four car lengths apart when I jumped on the south end of a little cut.

Q. A car is about how many feet?

A. I guess they are different lengths, but they are something like 70 feet; some of them more but something like that.

Q. Then after you got up you went down to where Mr. Hotchkiss was, didn't you?

A. After I came to, yes sir.

Q. And you found Mr. Hotchkiss right down at the wreck, practically under the wreck?

A. No.

194 Mr. TAYLOR: We object as incompetent, irrelevant and immaterial.

Q. Well you found him further south than where you jumped off, didn't you?

Mr. TAYLOR: That is not proper cross-examination, and unless they show he went down there within a reasonable time after that, we object.

Q. Well where did you find Mr. Hotchkiss?

A. He was on the west side of the track.

Q. That was the side of the engine that he worked on, wasn't it?

A. Yes sir, going south.

Q. And what was his condition when you found him, if you know?

Mr. TAYLOR: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection sustained.

Q. Where was Mr. Hotchkiss when you first saw him after the wreck, Mr. Emory?

A. He was on the west side of the track.

Q. West side of the track, was he north or south of where you jumped from the train?

A. Now I couldn't say; I was unconscious when I got up and I don't know just where I was; I know right about where I jumped, where I left the train; south end of a little cut.

Q. When you found him was he nearer the point where the two engine- met and collided than where you were when you jumped?

A. He wasn't very far, I think a little to the right but I don't know, may be 12 feet or 14 from the rail and to the right.

Q. Do you remember of somebody having called and coming down toward the wreck to where Mr. Hotchkiss was lying?

195 A. No sir.

Q. Do you remember what Mr. Hotchkiss' condition was at the place you found him lying?

A. Yes sir.

Q. What was his condition?

A. He wasn't lying, he was sitting up on the ground, and I says to him, "Are you hurt," and he says, "Yes, my leg is broken"; and that is about all the words there was passed between us and it was a pretty warm day, and by that time I went over to the edge of the train and laid down in the shade of the train.

Q. Now do you know how far he was laying from the wreckage and timbers and things?

A. No sir, it wasn't very far though.

Q. You wouldn't undertake to say in feet?

A. No, I couldn't say exactly the feet.

Q. Now Mr. Emory, when — cross that bridge you say it was always your habit to put coal in the engine, on leaving the bridge?

A. Yes sir, just after the engine got through the bridge.

Q. After it got to the bridge?

A. Just as the engine came out of the south end of the bridge, then I always begin to give her fire.

Q. Did you put in any fire before the engine reached the bridge?

A. Yes sir, before I reached the bridge; never put in fire when I was on the bridge; before we hit the bridge and leaving it.

Q. Do you remember how many shovels full you put in that day after leaving the bridge?

A. Yes sir.

Q. How many?

A. Two.

196 Q. Now when putting in coal where do you stand on the engine?

A. Well say this is that apron that runs between the deck of the engine and the tank, I was standing one foot on the engine deck and the other one on the tank.

Q. And what do you mean by the deck of the engine?

A. Well may be you would call it the gang way; the deck of the engine where the tank and the engine are coupled together.

Q. The deck is a part of the cab, is it not?

A. Yes sir, the deck of the engine is from where you bring the coal up to the fire box.

Q. It is the floor of the cab of the engine?

A. Yes sir.

Q. Now the throttle of the engine is along the side of the cab, is it not?

A. It is behind the boiler head; you say this is the boiler and it is an attachment that runs out to the right in front of the engineer.

Q. How far is it from the end of the boiler where the door is that you put coal in back to the end of the cab?

A. Back to the end of the cab?

Q. Yes?

A. I don't know as I understand you.

Q. How far is it from the end of the boiler to the end of the cab?

A. Back toward the tank where the coal is?

Q. Yes?

A. Why I couldn't say exactly; you mean from the boiler head back to where the tank and the engine is coupled together; from the fire box to where the tank is coupled on to the engine?

197 Q. Yes, you can put it that way if you want to?

A. Well, it isn't very far, I judge not over, I couldn't say exactly, 4 or 5 feet, something like that.

Q. Where did you coal your engine?

A. It was coaled at Parsons.

Q. Where were you expecting to coal it again that day?

Mr. TAYLOR: That is objected to as immaterial.

By the COURT: Objection overruled.

Q. (Question read by stenographer)?

A. At Muskogee.

Q. Then you had practically used up your coal, hadn't you?

A. No sir.

Q. You had to go back into the tank at that time to get your coal?

A. No sir.

Q. Could you stand on the place between the cab and the tender and reach back and get your coal?

A. Yes sir.

Q. Now how wide was that particular cab?

A. Well, I couldn't say, just how wide the cab was; it is the same on the other cabs of the same make; it is a big engine.

Q. About in feet?

A. What you have reference to is right there w-ere this apron would run, how wide there?

Q. Well how wide from the side on one side of the cab and the side on the other side of the cab?

A. Well, I never,—I couldn't say positive, but I think it would be 7 or 8 feet from one side to the other.

198 Q. At no time during these circumstances which you have been detailing was Mr. Hotchkiss on your side of the cab, was he?

A. Not this day.

Q. He remained on his side of the cab?

A. Yes sir.

Q. Now where was the brake valve located on that engine?

A. On the right hand side.

Q. On the boiler; was it fastened on to the boiler of the engine?

A. Right behind the boiler on the right hand side.

Q. That is the side on which Mr. Hotchkiss was working?

A. Yes sir.

Q. Now where was the throttle on that engine located?

A. On the same side.

Q. And where was the valve that you opened the sand with, on that side of the engine on that engine?

A. They were all on the right side of the engine.

Q. All on the right hand side of the engine?

A. Yes sir.

Q. Do you say, Mr. Emory, that you heard the application of air go on?

A. Yes sir.

Q. That was the way you told that the air was being applied?

A. Yes sir.

Q. Now the sound of the valve would not make any difference in the service application and the emergency application, would it?

A. O, yes sir.

Q. Your train was running at a high speed at that time?

A. Yes sir.

Q. You were throwing coal into your engine?

A. Yes sir.

199 Q. You were attending to your duties?

A. Never felt the shock of it on my feet.

Q. Answer me, you were attending to your duties there as fire-man?

A. Yes sir.

Q. You were not assuming any of the duties of the engineer at that time?

A. No sir.

Q. That is all.

Redirect examination by Mr. TAYLOR:

Q. You say you never felt the shock of the air? If the emergency had been put on what would have been the immediate effect?

Mr. ALLEN: We object as incompetent, irrelevant and immaterial. By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

A. Well if the emergency had been put on and me stooped over there putting in the fire it would have made such a shock that I would have went right up against the boiler head.

Q. You felt no shock at all?

A. I felt none at all.

Q. Could the emergency have been put on without your feeling it?

Mr. ALLEN: We object as incompetent, irrelevant and immaterial. By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

A. No sir.

Q. That is all.

(Witness excused.)

200 Mr. TAYLOR: At this time I will offer in evidence from Volume 20 of the American and English Encyclopedia of Law, second edition, on page 885, the mortality tables and from the tables will read the part which applies to the ages which have been testified to by the witness here. First as to the age of Mr. William B. West at the time of his death which was 38 years, and then as to the expectancy at the age of 36 years, being the age of the widow—

Mr. ALLEN: Defendant objects to the introduction in evidence of the alleged mortality tables because it is incompetent, irrelevant and immaterial, both as to the deceased and as to the widow.

By the COURT: Objection overruled as to both.

Mr. ALLEN: The defendant excepts.

Mr. TAYLOR: Reading from the table, if there is no objection—

By the COURT: Well the objection was overruled.

Mr. TAYLOR: What I mean is instead of offering the whole book and the table but will just read those particular items relating to the expectancy.

Mr. ALLEN: I insist he just offer in evidence that part of the page and of course we make our objection to it: I understand there would not be any objection reading to the jury that part of the exhibit he claims is applicable to the case.

Mr. TAYLOR: That is all I want because I didn't want to put the book in evidence. Reading from the exhibit which has been offered

201 in evidence to the jury in order that they may understand this, the expectancy of life as there given by the mortality table at the age of 38 is 29.62 years, that being the age testified to of the deceased; the age of the widow at 36 according to the American Mortality Table is 31.07 years.

DANIEL O'CONNELL, being first duly sworn, testified as follows on behalf of the plaintiff:

Direct examination by Mr. TAYLOR:

Q. State your name?

A. Daniel O'Connell.

Q. What is your business?

A. Train Dispatcher.

Q. How old are you?

A. 35.

Q. For whom are you train dispatcher?

A. For the Missouri, Kansas & Texas.

Q. How long have you been train dispatcher for them?

A. 7 or 8 years.

Q. Were you train dispatcher at Parsons, Kansas, on May 15, 1908?

A. Yes sir.

Q. Are you familiar with the different trains running over the lines which is extending from Parsons to Muskogee?

A. Yes sir.

Q. Is that the main line of the Company?

A. Yes sir, that is the main line.

Q. Is that a single or double track?

A. Single.

Q. What trains are operated over that track; what I mean is both passenger and freight trains?

A. Yes sir, that kind of traffic.

202 Q. And over that line you call that the main line as distinguished from local lines, don't you?

A. Well local work is done on the main line just the same.

Q. Yes, I understand that, when you say it is the main line?

A. I mean it is not a branch.

Q. You say they carried local traffic, what do you mean by that?

A. Well they do intermediate work between terminals.

Q. That is carry traffic between one town and another in the same State?

A. Yes sir, and between all towns.

Q. And between towns in one State and another?

A. Yes sir.

Q. So that traffic both freight and passenger is carried on this line and on the trains of this line between towns in the State of Oklahoma?

A. Yes sir.

Q. And also between towns in the State of Kansas, is it not?

A. Yes sir.

Q. And also between towns in Kansas and towns in Oklahoma?

A. Yes sir.

Q. And the same with respect to other States where the line runs?

A. Yes sir.

Q. Carries local traffic as well as traffic across the line?

A. Yes sir.

Q. What is this Coffeyville branch of the road?

A. It isn't a branch.

Q. That is what they call, Coffeyville branch?

A. No, it isn't known as the Coffeyville branch; it is a road that runs through Coffeyville on the M. K. & T. and known as the Osage Division.

203 Q. Well how long has that been known as the Osage Division?

A. Well, a good many years; it was known as that prior to May 15, 1908; for several years prior to that time.

Q. How long have you been connected with the Company?

A. About nine years.

Q. Now as train dispatcher how many passenger trains each day are dispatched over this main line between Parsons and Muskogee?

A. Well, the regular passenger trains, there would be about 12 at that time.

Q. That is on May 15, 1908?

A. Yes sir, but there was four of those that operated on the main line, on this line between here and Verdark, didn't go any further north on that particular line.

Q. Well how many between here and Verdark?

A. Well I think there was four more.

Q. And how many would that be all together?

A. Well now, maybe 14, I would have to—

Q. I mean about how many.

A. There was some of them,—may be there would be 16; there was four of them at that time that operated between Cherokee Junction and Parsons; that is nine miles this side of Parsons.

Q. I mean from Muskogee to Verdark?

A. I think there was 12 at that time.

Q. And that would be 6 each way, or 12 each way?

A. 6 each way.

Q. And how many freight trains?

A. Well, I don't know, they varied every day.

Q. Well approximately?

A. Well there is never the same amount.

Q. Well, at that time about how many freight trains?

A. Well may be 8 or 10 each way.

204 Q. I suppose you have a much greater amount of traffic over the main line than over any of the other lines?

A. Well, yes sir.

Q. That is all.

Cross-examination by Mr. ALLEN:

Q. You are still train dispatcher for the M. K. & T. I believe?

A. Yes sir.

Q. Located at Parsons?

A. Yes sir.

Q. Dispatcher over the same division of which you were dispatcher at the time of this collision?

A. No sir.

Q. What division are you on now?

A. I am on the north end, working north from Parsons now. However that part of the Territory between here and Wagoner we handled that from Parsons at that time, and now that is handled at Denison.

Q. There has been a change in the terminal points since that time?

A. Yes sir, we don't handle any further south than Wagoner from Parsons.

Q. At that time you had the particular division on which the accident occurred?

A. Yes sir.

Q. Who put out the orders for the running of the freight train 412 and the passenger train No. 5?

Mr. TAYLOR: We object as not proper cross examination.

By the COURT: Objection overruled.

Mr. TAYLOR: The plaintiff excepts.

205 A. I put out the orders.

Q. What kind of a train is the train No. 5 and was at the time of the accident?

A. First class passenger train.

Q. Where did it *from* from and to?

Mr. TAYLOR: That is objected to as not proper cross examination.

By the COURT: Objection overruled.

A. Runs from St. Louis to Texas.

Q. In its course of Passage from St. Louis to Texas what States does it pass through, if you know?

Mr. TAYLOR: We object as not proper cross examination.

By the COURT: Objection sustained.

Mr. ALLEN: The defendant excepts.

Q. And with reference to the freight train No. 412, which was involved in the collision, where was that train destined to at the time of the collision.

A. Parsons, Kansas.

Q. Where did the train originate, No. 412?

A. Muskogee.

Q. That is all.

(Witness excused.)

Mr. TAYLOR: The plaintiff rests.

Mr. RALLS: If the court please the defendant desires to move the Court to exclude from the consideration of the jury the evidence offered by the plaintiff and read to the jury in regard to the mortality table and as to the expectancy, because the evidence is
206 incompetent, irrelevant and immaterial, and there is no proof showing the table from which the counsel read is a correct table.

By the COURT: Motion overruled.

Mr. RALLS: The defendant excepts.

Mr. RALLS: Now, if the Court please, the defendant desires to demur to the evidence of the plaintiff for the reason it fails to establish any cause of action in favor of the plaintiff against the defendant.

By the COURT: The demurrer is overruled.

Mr. RALLS: The defendant excepts.

G. C. GATES, being first duly sworn, testifies as follows on behalf of the defendant.

Direct examination by Mr. ALLEN:

Q. State your name?

A. G. C. Gates.

Q. Have you been sworn, Mr. Gates?

A. Yes sir.

Q. Where do you live at this time?

A. Dallas, Texas.

Q. What was your employment, Mr. Gates, during the month of October, 1906; I don't mean 1906, I mean 1896?

A. I was road agent American Express Company at that time.

Q. Were you acquainted with the person who was an express messenger on the train known as William B. West, in his life time?

A. Yes sir.

Q. I show you an American Express Company's application for Situation of William Burdett West, and ask you if you are acquainted with that paper?

207 A. Yes sir.

Q. Does that paper bear your signature, Mr. Gates?

A. Yes sir.

Q. Does it bear the signature of Mr. West?

Mr. TAYLOR: That is objected to as incompetent, irrelevant and immaterial, and if it is what I assume it is, it seems to me it might be well to excuse the jury on this argument because I propose to keep these papers out of the record, if possible, and I don't think they are admissible and before we get them in the record I want to dispose of that question.

By the COURT: Well it is now near 12 o'clock so we will dispose of that question before noon.

Thereupon the Court admonished the jury, permitted them to separate and ordered them to return into Court at 1:30 P. M.

Mr. TAYLOR: As far as the signature is concerned, at the proper time we are willing to admit that it is his signature, if the papers

have any bearing in the case at all. The paper which is shown the witness and which counsel I understand proposes to make an exhibit in the case is objected to on the ground that it is not pleaded, and on the further ground that it is incompetent, irrelevant and immaterial, and shows on its face that it is void under the laws of the State of Kansas where it was made as also appears upon the face of the paper, and on the further ground that it is a paper purporting to be an application, an agreement made between the plaintiff in this action and a person not a party to this action and having no connection with it, and a paper which the defendant in this action has not signed, and upon which the defendant is in no way bound. The grounds

208 with respect to its being void under the Statutes of the State of Kansas where it was made, of course, is purely a matter of law, and it may be we had better argue that at this time, but I think the other objections are perfectly good to it, so I suppose we might as well take that up first.

By the COURT: Is not that one of the contracts pleaded?

Mr. TAYLOR: I think not, but they have two others here. We make the same objection *the* the three papers presented.

Mr. RALLS: We expect to show in this connection that the deceased made these applications for employment upon the terms expressed in the application, and that he was employed according to those terms and was acting as such employee under the terms of these applications at the time he received the injury, and that in this application he had stipulated and agreed that the American Express Company might, for him, go into a contract releasing any railroad company from liability on account of injuries in the words as set out in the accident release clause contained in the application. And we expect to follow that up by showing that the American Express Company did enter into a contract releasing the M., K. & T. Railroad Company from liability for any of the accidents provided for in this application; and that the accident which caused his death was one that was covered by the provisions of this application, and that it released the M., K. & T. Railroad Company from any liability on account of the death of West, and the witness we had on the witness stand was to show the signature of West, and to show further that he was employed and worked under the terms of these contracts.

209 Mr. TAYLOR: Of course it is denied he was working under these contracts. I will ask the reporter to enter right here the further objection that the contracts and matters which counsel has referred to as being made between the defendant railroad company and the American Express Company are not pleaded as set out and could not possibly bind the plaintiff in this action; they are immaterial.

Whereupon the hour of noon having arrived Court took a recess until 1:30 P. M.

Afternoon Session.

Thereupon the following proceedings were had in the presence of the jury:

Mr. ALLEN: We now offer in evidence the application for situation of William B. West, Parsons, Kansas, for the position of messenger, dated October 16, 1896, the signature of Mr. West having been admitted by counsel for the plaintiff which document includes the accident release over the signature of Mr. West, as Defendant's Ex. "A."

Mr. ALLEN: The defendant now offers in evidence the application for situation of W. B. West, the deceased, for the position of driver bearing date of January 9, 1893, and the line being erased there with February 1st inserted above, it being admitted by the plaintiff that the signature of W. B. West appended to the application is the signature of the deceased W. B. West, which application also includes a release accident clause over said signature, as Defendant's Ex. "B."

Mr. ALLEN: Defendant now offers in evidence the application for situation of William B. West of Parsons, Kansas as driver, dated October 18, 1893, the signature of said William B. West, 210 or W. B. West being admitted by the plaintiff, which document also includes accident release. In connection with this application I will say it has not been pleaded in our answers in this case for the reason that at the time of the preparation of the answer counsel for defendant had not been supplied with the release and we now ask leave to amend our third amended answer to show the execution of this release and our reliance upon this defense in the same manner as the other releases have been pleaded. We ask the exhibit be marked Defendant's Ex. "C."

Mr. TAYLOR: Plaintiff objects to the offer of exhibits "A," "B," and "C" on the ground that they, and the papers and contracts referred to in them have not been pleaded, and that since they are incomplete, and on the further ground that they are incompetent, irrelevant and immaterial, and show on their face that they refer to other employment than that in which plaintiff was engaged at the time of this accident, and on the ground that upon their face they are outlawed and barred by the statute, and on the further ground that the plaintiff at the time of this accident was not engaged in any employment referred to or contemplated in the instrument, and on the further ground that the instruments and all three of them are shown on their face to be contracts of the State of Kansas and made therein, and that they are void absolutely under the laws of the State of Kansas wherein they were made, and under the decisions of that State, and in connection with the last of these objections plaintiff offers the 211 statutes in evidence of the State of Kansas, which were pleaded in in the reply to defendant's second and third amended answers.

Mr. RALLS: The defendant objects to the introduction of the Kansas statute referred to on the ground it is incompetent, irrelevant and immaterial, and inadmissible. I am not objecting to the form — he is offering it, but to the statute itself.

By the COURT: Objection overruled.

Mr. RALLS: The defendant excepts.

Mr. TAYLOR: The section- referred to which the plaintiff introduces in evidence are those contained in the General statutes of Kansas of 1905 on page 1257, being sections No- 6311 and 6312.

Section 6311 reading: "Liable for damages. That railroads in this State shall be liable for all damages done to person or property, when done in consequence of any neglect on the part of the railroad companies." (L. 1870, ch. 93.)

Section 6312 reading: "To employé. 22. Every railroad company organized or doing business in the State of Kansas shall be liable for all damages done to any employé of said Company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés, to any person sustaining such damages: Provided, That notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury."

212 There is something further in that section but nothing that relates to this case, so I will merely introduce that portion of that section unless counsel wants me to read it all.

Mr. RALLS: We will offer evidence to show that the deceased was working under this particular contract at the time he was injured; that this contract was broad enough and did cover the employment while he was in the employ of the American Express Company.

By the COURT: It has always been a question with this Court as to how far things ought to go with reference to public policy; it is a pretty broad question. This Kansas statute is plain concerning the action of railroads in paying damages, etc. I am of the opinion, gentlemen, from what I have read and the argument here, that these contracts are void. You can make your offer to prove them and get them in the record and we will go on. I will so hold that the contracts of employment that have been offered in evidence heretofore, the Kansas Statute.

Mr. RALLS: The defendant excepts to the ruling of the Court.

Mr. RALLS: We now offer to prove by this witness that the deceased, Mr. West, was at the time of the accident which resulted in his death working for the American Express Company under the contract of employment that have been offered in evidence heretofore.

Mr. TAYLOR: We desire to make the same objection to this offer of counsel as those made to the offer to introduce the exhibits.

By the COURT: Objection sustained.

Mr. RALLS: The defendant excepts.

213 Mr. RALLS: I presume the objection is sustained on the theory that the contracts are void?

By the COURT: Yes.

Mr. RALLS: The defendant excepts.

Q. That is all with this witness.

(Witness excused.)

F. D. ADAMS, being first duly sworn, testified as follows on behalf of the defendant:

Direct examination by Mr. ALLEN:

Q. State your name?

A. F. D. Adams.

Q. Have you been sworn as a witness, Mr. Adams?

A. Well I was sworn yesterday, yes sir.

Q. What is your business, Mr. Adams?

A. At present time, General Superintendent of the Southern Division of the American Express Company.

Q. Did you know Mr. West in his lifetime?

A. Yes sir.

Q. Do you know of the,—at the time of his death, or do you know the time of his death?

A. I didn't understand your question.

Q. Do you know at what time he met his death?

A. Yes sir, May 15, 1908.

Q. At the time do you know what relation existed between Mr. West and the M., K. & T. Railroad Company with reference to handling baggage of that Company?

A. Yes sir.

Q. What was that relation, Mr. Adams?

214 Mr. TAYLOR: I would like to ask first if there was anything in writing, any written agreement?

By the COURT: Don't you plead Mr. Taylor he also handled passenger baggage?

Mr. TAYLOR: Yes, sir, we plead it.

Mr. ALLEN: We expect to go further by this witness.

By the COURT: All right, go ahead and ask the question.

Mr. TAYLOR: Is there a written contract regarding it?

WITNESS: I don't exactly understand what you refer to as a written contract.

Mr. TAYLOR: He asked you what the relation was between the two and I want to know if it was expressed by any written agreement?

WITNESS: I couldn't say that there was.

Q. Now, what was that relation, Mr. Adams?

Mr. TAYLOR: That is objected to as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. TAYLOR: The plaintiff excepts.

A. Well, he was a joint messenger and baggage man.

Q. By joint you mean joint with the M., K. & T. and the express company?

A. Worked for both companies, yes sir.

Q. Do you know what proportion of his salary was paid by those companies, or whether it was paid in any proportion?

A. Equal division.

By Mr. TAYLOR:

215 Q. Was this in writing, any of it, relating to the salary as between the railroad company and the express company; if it is in writing this is not the best evidence?

Mr. RALLS: We offer this for the purpose of showing that the deceased was a joint employé of the American Express Company and the M., K. & T. Railroad Company, while he was running as messenger on the line.

Mr. TAYLOR: If this agreement was in writing it is the best evidence; I don't see why we are bound by any agreement between these two companies.

By the COURT: If the agreement was not in writing he can answer the question.

Mr. TAYLOR: The plaintiff excepts.

By Mr. ALLEN:

Q. Have you got a copy of a notice among your files or in your possession directed to the various messengers of the American Express Company as to their duties with reference to the baggage of the Missouri, Kansas & Texas Railroad Company?

A. I have a copy of a general circular issued to them.

Q. Have you it with you?

A. Yes sir.

Q. Produce it, please sir?

A. Here is a copy.

Q. By whom was this circular issued, Mr. Adams?

A. It was issued by myself.

Q. In what capacity?

A. As superintendent.

216 Q. It is directed to joint messengers and baggage men; it appears to be on the M., K. & T. line; that means joint messengers of what?

A. Joint messengers; we call or term these men messengers, and the railroad baggage men, and the word joint signifies they worked for both companies.

Q. Does that include the position which Mr. West occupied?

A. Yes sir.

Mr. TAYLOR: That is objected to as calling for a conclusion and incompetent, irrelevant and immaterial, and we ask that it be stricken.

By the COURT: Objection sustained; the answer will be stricken.

Mr. ALLEN: We offer in evidence the paper identified by the witness, being a copy of instructions to joint messengers and baggage men on the M., K. & T. lines as Defendant's Ex. "D."

Mr. TAYLOR: It is objected to on the ground that it is incompetent, irrelevant and immaterial, and not the best evidence, and that the recitals therein contained are not shown to have ever been brought to the attention of the plaintiff in this action, and that the recitals themselves have no support in the evidence to sustain them.

Mr. ALLEN: I expect to show further how it was transmitted and

delivered, and how it reached these messengers, and how their attention was called to it.

By the COURT: If there is something in writing about the joint payment, I think it would be better than what you are offering there. Objection sustained.

Mr. ALLEN: The defendant excepts.

217 Mr. ALLEN: Now I take it that the Court has sustained this objection because it has not been sufficiently identified.

By the COURT: Well, it is simply just what he might have told this deceased, William B. West.

Mr. ALLEN: We offer to show by Mr. Adams that at the time Mr. West went into the service as messenger he understood that it was his, West's, duties to perform joint services for the railway company and the Express Company.

Mr. TAYLOR: Further than the matters offered to be shown and admitted by the pleadings, we object to the offer as incompetent, irrelevant and immaterial.

By the COURT: I think I will let him answer the question; objection overruled.

Mr. TAYLOR: The plaintiff excepts.

Q. What were Mr. West's duties with respect to the railway company as to handling the baggage, Mr. Adams?

A. Received the baggage at the stations, made a record of it, and put it off at its destination in the same manner any baggage man did.

Q. Do you know what runs he had at the time of his death?

A. He was running between Parsons, Kansas, and Dallas, Texas.

Q. Do you know whether, under such a run as that, he handled shipments of express from points in the State of Kansas to points in other States, for instance Oklahoma or Texas?

Mr. TAYLOR: That is objected to as incompetent, irrelevant and immaterial, but we will admit that he handled express and baggage matter between local points in each State and also between points in one State and points in another State.

218 By the COURT: Answer the question then.

Mr. ALLEN: That is all I wanted to prove by him.

Q. Do you know whether Mr. West, at the time he was employed as messenger knew that he was to handle the baggage of the railroad company and act as joint employé of the railroad company and the express company.

Mr. TAYLOR: As to his opinion as to what Mr. West knew at that time we object as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. TAYLOR: The plaintiff excepts.

A. He did and was told to post himself in the work of both companies.

Q. Do you know, Mr. Adams, whether or not that train upon which Mr. West was messenger carried interstate baggage, or baggage from points in one State to points in another State?

A. I would not be able to say upon that particular occasion, I could state as to express.

Q. That is all.

Cross-examination by Mr. TAYLOR:

Q. Who paid Mr. West?

A. He drew his money from the express company.

Q. All of his salary came from the express company?

A. Yes sir.

219 Q. And for any work he done for them in handling baggage the railroad company would pay over to the express company?

A. They paid us one-half of his salary; we drew a bill against them in his name and the other baggage men.

Q. That is all.

(Witness excused.)

A. L. BIRD, being first duly sworn, testified as follows on behalf of the defendant:

Direct examination by Mr. ALLEN:

Q. State your name?

A. A. L. Bird.

Q. Where do you live, Mr. Bird?

A. Dallas, Texas.

Q. What is your position, did you say?

A. Superintendent American Express Company.

Q. Did you know Mr. W. B. West in his life time?

A. I did.

Q. Do you recollect the occasion of his death?

A. Yes sir.

Q. Who was he working under, Mr. Bird?

A. Under my direct supervision.

Q. You know the salary he was receiving at the time, do you?

A. Yes sir.

Q. Were you acquainted with his general ability and capabilities for work?

A. O, I think so, yes sir, fairly so anyway.

Q. How long had you known Mr. West?

A. Probably about four years.

220 Q. I will ask you whether or not knowing his ability and knowing him generally, whether or not there was any opportunity for advancement with that Company?

Mr. TAYLOR: That is objected to as incompetent, irrelevant and immaterial, and calling for a conclusion. And further on the ground there is no foundation laid. This one man of the Company can't express an opinion as to whether another employé was going to get an advancement.

By the COURT: Objection overruled.

Mr. TAYLOR: The plaintiff excepts.

Q. (Question read by stenographer.)

A. I believe that there was no probability of his being given any better position with the Company.

Mr. TAYLOR: Now I ask to have the answer stricken out on the ground that it is mere probability by the witness's own words.

By the COURT: Well, let it stay for what it is worth. Objection overruled.

Mr. TAYLOR: The plaintiff excepts.

Q. Shortly prior to his death had Mr. West made any statements to you as to his physical condition?

Mr. TAYLOR: We object as incompetent, irrelevant and immaterial, conversations with the deceased.

By the COURT: Objection overruled.

Mr. ALLEN: The defendant excepts.

That is all.

221 Cross-examination by Mr. TAYLOR:

Q. Do you know that during his employment with the Company he had been advanced five different times?

A. I don't know about his employment more than the period covering the time I knew him.

Q. That was only four years?

A. Yes sir.

Q. Don't you know that during that four years he had one advancement?

A. No sir.

Q. Have you looked that up?

A. Not especially.

Q. That is all.

Redirect examination by Mr. RALLS:

Q. Would going from office work as an employé in the office to messenger work be advancement or merely a change in the work?

A. Merely a change.

Mr. TAYLOR: We object as calling for a conclusion.

By the COURT: Objection overruled.

Mr. TAYLOR: The plaintiff excepts.

Q. Then if a man was drawing \$50.00 in the office and was put on a run at \$83.00 a month, that would not be an advancement but a change of the kind of work he was doing for the Company.

Mr. TAYLOR: We object as leading and calling for a conclusion.

By the COURT: It is suggestive and calling for an answer. I think perhaps the jury might be the better judges of that from the facts.

222 Q. (Question read by stenographer.)

A. I don't see how I can answer that in its present form.

Q. Well, you can explain if you desire, Mr. Bird?

A. If you will let me explain it.

Mr. TAYLOR: Go on and explain it.

By the COURT: Go ahead.

A. I would have to go into the employment of men considerably to do that to the satisfaction of anybody. In other words, a man don't require any more ability as a messenger, or not as much, to get the pay this man was getting, than a \$50.00 clerk does; that is my answer; therefore it isn't necessarily an indication of ability that he gets more as a messenger than he does as a Clerk.

Q. That is all.

(Witness excused.)

SAMUEL SONDHEIMER, being first duly sworn, testified as follows on behalf of the defendant:

Direct examination by Mr. ALLEN:

Q. State your name?

A. Samuel Sondheimer.

Q. Have you been sworn as a witness?

A. No sir.

(Witness was here sworn.)

Q. Where do you live, Mr. Sondheimer?

A. Here.

Q. What is your business?

A. I am in the hide business.

223 Q. Have you any connection with the M., K. & T. Railroad Co.?

A. None whatever.

Q. Were you a passenger on the train known as the Katy Flyer that was wrecked on May 15, 1908?

A. Yes sir.

Q. Do you recollect the extent of the collision?

A. You mean, when it struck?

Q. Yes?

A. Yes sir, I remember it quite well, I was hurt.

Q. You say you were hurt?

A. Slightly, yes sir.

Q. I will ask you whether or not before the two engines struck you felt an application of the brakes and the stopping of the train?

A. I did.

Mr. TAYLOR: Wait a minute; that is leading; ask him what he felt.

By the COURT: Don't lead any more than you can help.

Q. Just go ahead, Mr. Sondheimer, and tell the jury just what you felt and where you felt it and how it affected you?

A. Well, when the air was put on I felt the wheels jar just like it was sorter grinding and stop, and I thought something was going to happen and I braced myself against the seat: I was in a chair car, and about the time I became firmly braced, I don't know how long a time it was, the accident happened; I was almost thrown out of my seat by the air brakes being thrown on, and if I hadn't braced myself

I would have been thrown through the window.

224 Q. You say you were almost thrown out of your seat by the application of the air?

A. Yes sir.

Q. You say you thought something was going to happen?

A. Yes sir.

Q. Well, what made you think that, Mr. Sondheimer?

A. Well, I have been on freight trains a good deal, and I know when they apply the air, that a car suddenly stops and almost throws you out of the seat, and when it happened I knew something was going to happen; I didn't know what it was and I braced myself and shortly afterwards the accident happened.

Q. That is all.

Cross-examination by Mr. TAYLOR:

Q. Have you been talking to Mr. McClure, a claim agent of the Company?

A. No sir.

Q. Do you know Mr. McClure?

A. I think I do.

Q. Did the company pay you anything for being hurt?

A. I could have received money, but I wouldn't accept it.

Q. How much did they offer you?

A. They didn't offer me anything.

Q. How do you know you could have received money?

A. They sent an adjuster around to see me.

Q. What is your name?

A. Sondheimer.

Q. And you wouldn't take the money?

A. No sir.

Q. That is all.

(Witness excused.)

225 JEROME B. HOTCHKISS, being first duly sworn, testified as follows on behalf of the defendant:

Direct examination by Mr. ALLEN:

Q. State your name?

A. Jerome B. Hotchkiss.

Q. Where do you live, Mr. Hotchkiss?

A. Parsons, Kansas.

Q. What is your business?

A. Locomotive engineer.

Q. What railroad?

A. Missouri, Kansas & Texas.

Q. Were you the engineer on train No. 5 that was in a collision north of Muskogee along about May 15, 1908?

A. I was.

Q. How long have you been employed as an engineer, Mr. Hotchkiss?

A. 33 years the 5th day of this coming September, that is on this road.

Q. What was your run, Mr. Hotchkiss, at the time of the accident?

A. Known as the Katy Flyer, No. 5, and No. 8 north.

Q. What kind of a train was that, as to class?

A. First class train.

Q. Do you recollect about what speed your train was making?

What direction was your train going upon that day?

A. Going south.

Q. Who was your fireman, Mr. Hotchkiss?

A. J. W. Emory.

Q. Do you recollect about what speed your train was making when it arrived there at the Arkansas bridge and was passing the Arkansas bridge?

A. I do.

Q. About what speed was it going?

A. 60 miles an hour at least.

Q. Now state to the jury, Mr. Hotchkiss, just what you did and what occurred when you went out of the bridge there, what you saw and the general circumstances as far as you can remember concerning that collision?

A. It is about 1,000 feet to the bridge to where I could see after I went out of the cut, as I went out of the cut I saw an engine coming toward me.

Q. What did you do?

A. I immediately put on my air, shut my engine off, opened what is called the leak scatter; there is a scatter there works by air.

Q. What kind of an application did you use?

A. Just like that and right into an emergency.

Q. You, of course, are a skilled engineer?

Mr. TAYLOR: That is objected to.

Mr. ALLEN: I will withdraw that statement.

Q. State whether or not there was anything else that could have been done which was not done by you to stop that train when you seen the approaching train?

A. Nothing whatever.

Q. You say by applying the air in the emergency, what does that mean?

A. I will say for the benefit of the jury we have what is called a brake valve, you push it over and it is what is called service stop, and you put it over further and that is your emergency; that is all the pressure you have; we carry 70 pounds' pressure, and we also carry what is called a reserve, 90 pounds, and that is on the drum of the tank, and when you push that thing over you get the full power of all of them; that throws it wide open.

Q. What effect does that have on the brakes on the cars and engine?

A. An emergency?

Q. Yes?

A. Why, it causes them to stand on there feet, and if anybody is standing up they are liable to fall at once; we are not allowed to use the emergency only under extreme circumstances.

Q. What did you do with the throttle?

A. Shut it off.

Q. What effect did that have on the steam?

A. Shut the steam off from the cylinders.

Q. Do you know where Emory was during that time?

A. He was putting in the fire when I first come out of the cut.

Q. Do you know where he left the engine?

A. No sir, when I got down he was gone.

Q. Got down from where?

A. When I got down off of my seat where I was sitting, he was gone.

Q. Gone where, what did you mean by that?

A. He had got off of the engine; I didn't see him get off, I was looking ahead.

Q. What did you do after you got down?

A. I unhitched; in other words jumped off about two engine lengths and a half before they collided.

Q. Do you know about where you fell?

A. Right close to the engine; struck on this foot and broke this limb right here, and I was hurt in here, also my ankle was stiff nearly four weeks.

228 Q. Do you remember Emory coming up to you when you were there on the ground, or do you recollect that?

A. Yes sir.

Q. State whether or not at that time you had moved your position from where you fell when you jumped?

A. No sir, I was lying on the ground?

Q. What train had the right of track from Wagoner to Muskogee?

A. No. 5 had absolute right over all trains.

Q. That was your train?

A. That was my train.

Q. That is all.

Cross-examination by Mr. TAYLOR:

Q. You were running late at the time, were you not?

A. 40 minutes.

Q. Now what was the last station that you had stopped at before you had got to the Arkansas bridge coming south?

A. Wagoner.

Q. How far is that north of the Arkansas bridge?

A. Well, it is 15 miles from Wagoner to Muskogee, and I think it is two and a half or three miles from here to the bridge; we call it three miles.

Q. And is there another station just north of the bridge?

A. Yes sir.

Q. What station?

A. Verdard is its name.

Q. How far is that north of the bridge?

A. Just a little over a mile.

Q. Did you stop there?

A. I did not.

Q. Where were you 40 minutes late?

229 A. I had orders from Wagoner to run 40 minutes late.

Q. Had you made up any time between Wagoner and the bridge?

A. A few minutes; I was two minutes late in my 40 minutes when I passed Verdard.

Q. You were running late and trying to make up time?

A. All I could.

Q. When did you first discover that there might be trouble ahead?

A. When I came out of the cut.

Q. How far were you from the bridge when you first saw something ahead of you?

A. I saw smoke before I got to the bridge.

Q. How far before you got to the bridge?

A. I couldn't tell exactly, but it was before I got to the bridge.

Q. About how long before you got to the bridge?

A. I presume a quarter of a mile.

Q. Did you keep your eye on that smoke?

A. Not materially, because we see it so often on this M., O. & G. going backwards and forwards, I supposed this was their train.

Q. Didn't you know there was a freight train running ahead of you that ran into Muskogee a few moments before your train?

A. No sir; I knew a train was ahead but I didn't know where it was.

Q. You had no orders or instructions whatever telling you where that train was?

A. No sir, but I knew it was ahead of me, because the order I got at Wagoner, order No. 34, had this train on.

Q. Now after you passed over that Arkansas river bridge coming south, what is the grade, up or down?

A. The grade is up after you come out of the cut.

Q. The cut is right at the south end of the bridge?

230 A. Yes sir.

Q. And as you come out of the cut the grade starts up?

A. Just after you leave past the cut the grade starts up around the curve.

Q. And did you ever overtake any trains stalled on that grade?

A. O, frequently.

Q. Well, how often?

Mr. RALLS: We object as immaterial.

By the COURT: Objection overruled.

Mr. RALLS: The defendant excepts.

A. What is it?

Q. How often had you overtaken trains stalled on that grade?

A. Once in a while there would be a train stalled there.

Q. When you got to the bridge and saw this something ahead, didn't it occur to you that train might be stalled?

A. No sir.

Q. You were not paying any attention to that train ahead of you?

A. No sir, and do you want to know why?

Q. No, not yet, I will bring that out in a minute; now did you

start to slow down your engine when you saw that something that smoke ahead of you?

A. No sir.

Q. Let her wide open; did you put on sand or anything toward stopping the train?

A. No sir, not when I saw the smoke.

Q. When you first came out of the bridge, coming south, clearing the bridge, what did you see then?

A. I didn't see anything only that smoke.

Q. Did you keep looking ahead?

A. Yes sir.

231 Q. You still saw that smoke?

A. Saw the smoke.

Q. Were you getting nearer to the smoke?

A. Yes sir, getting nearer.

Q. And after you come out of the bridge what did you do?

A. Kept coming.

Q. Didn't slow down or do anything?

A. No sir.

Q. And did you see that smoke still coming toward you?

A. I seen that smoke but I couldn't tell where it was.

Q. And you assumed that smoke was on the other track?

A. Yes sir, on the other track.

Q. Notwithstanding you knew a freight train was ahead of you?

A. Knew the train was ahead of me.

Q. And you were running 60 miles an hour?

A. I was running 60 miles an hour, sir.

Q. How far did you run toward that train before you knew that it was a train on the track ahead of you?

A. When I first came out of the cut I seen it.

Q. How far was that from the end of the bridge?

A. The cut is 1,000 feet long.

Q. And then your engine was 1,000 feet south of the bridge?

A. Yes sir.

Q. When you first saw this train?

A. Yes sir.

Q. What did you do?

A. When I first see it?

Q. Yes?

A. I put on my air and shut my engine off.

Q. Did you put on the service air?

A. Just like that and right over.

232 Q. Then what did you do?

A. Shut my engine off.

Q. That is a ratchet throttle, you have to open it and then shove it forward?

A. Yes sir.

Q. Did you stop to see whether you shut it clear forward or not?

A. All you have to do is to put your hand on it and shove it like that.

Q. How fast were you going when you struck the train?

A. I should judge I was going between 25 and 30 miles an hour.

Q. I will ask you this, when you came out of the bridge, were you looking ahead?

A. Yes sir.

Q. Did you see that train on the track ahead of you when you first came out of the bridge?

A. No sir, not until I came out of the cut?

Q. You couldn't see the engine of that train or the caboose of the train?

A. No sir.

Q. Did you hear the conductor of the freight train say from the caboose he saw your train as you came out of the bridge; did you hear that testimony here?

A. No sir, I haven't heard no testimony.

Q. And you are sure you were looking ahead?

A. I know I was; I ain't sure about it; I know it.

Q. And you did everything there with that engine—did you reverse the engine?

A. No, sir, I did not.

233 Q. Why didn't you?

A. Wouldn't do any good for the brakes were in the emergency.

Q. And what was the fireman doing when you first came out of the bridge?

A. Putting in the fire.

Q. Did you blow three short whistles as you came out of the bridge?

A. No sir.

Q. You didn't blow any whistles at all?

A. Not that I recollect of.

Q. And just as you came out of the bridge did you use the service brake?

A. No sir.

Q. Are you still in the employe of the company?

A. I am.

Q. Did the company pay you for your injuries?

A. Yes sir, I have settled with the company.

Q. And have you been talking with Mr. McClure, the claim agent?

A. Since I came here?

Q. Yes?

A. Not one word sir; just shook hands with him, and just a few minutes ago he said, "You will be the next man on the stand"; that is all I have said with him today.

Q. I suppose you talked with him before the other trial?

A. Nothing especial.

Q. Now, Mr. Hotchkiss, isn't it a fact that when you first saw that engine you were pretty excited?

A. Excited, of course I was excited, make any man excited to see an engine coming at him.

Q. Are you sure you remember just what you did there?

A. I know what I did, ain't sure about it.

Q. That is all.

234 Redirect examination by Mr. ALLEN:

Q. You speak about the M. O. & G. tracks along there, where are those M. O. & G. Tracks with reference to our tracks?

A. Run right parallel with us from Verdank up to the crossing on top of the hill.

Q. Do you know about how far it is from our tracks over to the M. O. & G.?

A. From our right-of-way they are just as close as they can get; their tracks are just the other side of our right-of-way there; run parallel with us.

Q. And you saw our tracks curve to the right coming south out of the bridge?

A. Yes sir.

Q. And the same is true of the M. O. & G. tracks?

A. Yes sir.

Q. What was the condition of the land beyond our right-of-way as to trees and shrubbery after coming out of the bridge and down there in the bottom on the right hand side of the track?

A. Why there is trees all along the right-of-way which have been cut since, I believe; I understood they were.

Q. About how high was that cut out of which you came?

A. It was so high you couldn't see anything coming until you get out of the cut.

Q. Now with reference to that freight train that they were talking about that might have been ahead of you, why were you not paying any attention to that train?

A. For the simple reason if they had stalled on the hill they always protect themselves with a flag by day and a red light at night, they throw off what is called a fusée and a man is supposed not to go over that fusée.

235 Q. By protecting themselves with a flag, what do you mean?

A. Protecting themselves with a flag, I should stop and pick up that flag if I couldn't see the train.

Q. Do you mean that train would protect themselves with a flag?

A. They send out the rear brakeman if the train should stall and a passenger train might catch up with it, they send a man right off with a flag and he stands there until I come unless he is called in; if he is called in he puts what is called a torpedo on the track; he goes one length from there and puts another, and when I strike these torpedoes one means to stop and two means something is ahead of me, and in day times they send a man out with a red flag, and a man slowing up and sees it is time for a passenger train he drops off as quick as he can get off and goes back and flags this train, and I answer it and stop and pick him up, and if I don't see what it is I go ahead to see what is the matter.

Q. That is all.

Recross-examination by Mr. TAYLOR:

Q. How far back does the flagman usually go?

A. Generally about 30 telegraph poles.

Q. How far is that?

A. I think now there is 42 poles to the mile; I want to be sure.

Q. The flagman goes back about 30 poles?

A. It used to be 32 poles to the mile, and now it is 40, if I am not mistaken, and if a man want- to know how fast he was going he could take out his watch and count 32 poles and see how fast he was going, but they have changed it now on this road, it is 40 or 42 poles to a mile.

236 Q. How high is your engine cab window about the ground?

A. Well sir, really I couldn't tell you, I never measured it.

Q. I don't mean to the inch?

A. Well there was 6 feet drivers under the engine I was running that day and probably that much about that is the running board, that is what the cab sits on.

Q. How high was your engine window above the ground?

A. I saw I couldn't tell you exactly because I never measured how high it was where I sat.

Q. That is all.

(Witness excused.)

S. J. LIPSCOMB, being first duly sworn, testified as follows on behalf of the defendant:

Direct examination by Mr. ALLEN:

Q. State your name?

A. S. J. Lipscomb.

Q. Have you been sworn?

A. No, I have not.

(Witness was here sworn.)

Q. What is your business, Mr. Lipscomb?

A. I am stenographer and law clerk.

Q. Who do you work for?

A. I work for Owen & Stone.

Q. Have you any business connection with the M. K. & T. road?

A. No sir, none whatever.

Q. Were you a passenger on the train the time the freight train and passenger train collided north of Muskogee May 15, 1908?

A. Yes sir.

237 Q. State whether or not before that collision, and after leaving the Arkansas bridge, you felt an application of the brakes upon the passenger train?

Mr. TAYLOR: That is objected to as calling for a conclusion.

By the COURT: Objection sustained. Let him state what he did felt or heard.

Q. Well before the collision state what, if anything, you felt with reference to the movement of the train?

A. Well I felt a shock.

Q. What kind of a shock, what do you mean, Mr. Lipscomb?

A. Well I was thrown out of my seat, and I knew something had happened to the train.

Q. What time was that with reference to the time the two trains collided?

A. Why it was shortly before, I don't know just how long; it wasn't very long, I was thrown out of my seat and had just gotten back into it when the real wreck occur-ed.

Q. Do you know what caused you to be thrown out of your seat, could you tell?

A. Yes sir.

Q. What was it?

A. Putting on the air brakes on the wheels of the train.

Q. That is all.

Cross-examination by Mr. TAYLOR:

Q. Where were — sitting, what seat?

A. I was in the second seat from the front, sitting on the right hand side.

Q. There was one seat in front of you?

A. Yes sir.

238 Q. Which way were you thrown?

A. Over the front seat.

Q. And that is when the air was put on?

A. Yes sir.

Q. That is all.

(Witness excused.)

E. L. GREEN, being first duly sworn, testified as follows on behalf of the defendant:

Direct examination by Mr. ALLEN:

Q. State your name?

A. E. L. Green.

Q. Where do you live, Mr. Green?

A. Parsons, Kansas.

Q. What is your business?

A. I am running a passenger train on the M. K. & T.

Q. Do you remember the collision that occurred north of Muskogee, May 15, 1908?

A. Yes sir.

Q. Do you know who was the conductor on that passenger train involved in that accident?

A. I was conductor on that train.

Q. I will ask you, Mr. Green, how long you have been conductor on railroads?

A. Since 1880 with the exception of about 13 months.

Q. During your service as conductor on railroad trains have you

had occasion to notice the application of brakes on trains and the effect it has on trains?

A. Yes sir.

239 Q. State whether or not you felt the application of any brakes upon this passenger — on which you were conductor shortly before the collision occur-ed?

A. I did, yes sir, I felt the brakes holding the train.

Q. Just explain how it affected the train and affected you; what you did, if anything?

A. Why the first that I noticed of anything wrong at that time, at that time I didn't really realize anything was wrong, was the brakes being set, the heavy application of the brakes and I suppose they were stopping for a train that possibly might be stalled on the hill, but in an instant, I have a habit of bracing myself, it comes from a force of habit, I felt,—instantly those things passed, and I felt the severe application or at least an attempt was being made to stop the train to bring it to a stand still, and I put my feet up against the back of the chair and held with each hand to the arms of the seat and the collision occurred; and there was nothing else to make me do that except the brakes being set; feeling the brakes grinding and the train slowing down.

Q. What kind of an application of brakes would you saw that was, Mr. Green?

A. I would say the full application. The first application, I couldn't tell just how much, but almost instantly I could feel an effort was being made to stop the train.

Q. That is all.

Cross-examination by Mr. TAYLOR:

Q. When the brakes are applied suddenly which way do you go, backwards or forwards; when you are standing for instance?

A. Well naturally one would fall forward, toward the forward end of the train.

240 Q. When the brakes are applied?

A. Yes sir.

Q. And did you fall that way?

A. I didn't fall at all.

Q. Are you still working for the company?

A. Yes sir.

Q. That is all.

(Witness excused.)

W. V. McClure, being first duly sworn, testified as follows on behalf of the defendant:

Direct examination by Mr. ALLEN:

Q. State your name?

A. W. V. McClure.

Q. What is your business, Mr. McClure?

A. Assistant Claim Agent for the M., K. & T. Railroad.

Q. Were you employed by the company at the time of this collision they are talking about?

A. I was.

Q. Were you on the train at the time?

A. I was.

Q. As Assistant Claim Agent did you have occasion to ride on trains frequently?

A. Yes sir, I ride on trains almost every day.

Q. Do you have occasion to notice the different application of air and effect on the trains?

A. I do.

Q. I will ask you to state to the jury what happened and what you observed immediately preceding that collision with reference to the braking of the train.

A. I got on the train at Wagoner to go to McAlester, and
241 just about the time the train came through Verdard I was riding in the rear sleeper, and I hadn't paid yet and I wanted to get my cash and go back on again and I had gotten up to the rear end of the second chair car in the train, and just after we had passed the Arkansas River bridge, the car I was in had passed out of the bridge, and as I was walking toward the front the emergency brakes were put on and it threw me forward, and I dropped into the second chair on the left hand side, and I had just gotten down and got braced good when the collision occurred.

Q. What did you do immediately after the collision occurred?
Mr. McClure?

A. The first thing I did, the car was full of people, quite a number in there, they all commenced to hollering, and I got up on the seat and told them it was all over and I turned right around and went out the rear door and raised the platform, opened the vestibule door and stepped out, and just as I stepped out I saw Emory a little north of me, the fireman, on the ground, he was just getting up, and I ran out to him and asked him if he was hurt, and he says the back of my neck is hurt, and we stood there 5 or 6 seconds, I guess.

Q. About how far was Emory from the point where the engines collided?

A. Well Emory was right off and a little past the center of the first sleeper, and there was two chair cars and a combination mail and Jim Crow car and baggage car, and those cars are in the neighborhood of 70 feet long.

Q. Well did you and Emory go anywhere after you met him there?

A. Yes, sir, I spoke to him and asked him if he was hurt.

242 Mr. TAYLOR: The conversation is objected to.
By the COURT: Just state what you did.

A. Well, Emory and I started up to go up to the head end to see where the engineer was.

Q. Did you find the engineer?

A. Yes sir, we went up along the east side of the train to the Jim

Crow car and we crawled under the Jim Crow car and Uncle Joe was lying right there.

Q. Where was that with reference to where they collided?

A. You see the baggage car piled up on top of these engines, and it was just one car back.

Q. The baggage car piled up on top of the wreck and the next car was the Jim Crow car?

A. Jim Crow and combination mail car.

Q. And Mr. Hotchkiss was lying opposite that car?

A. Yes sir, opposite that car on the west side of the track.

Q. Now which one was nearer the wreck, Emory or Hotchkiss?

A. Hotchkiss was nearer the wreck.

Q. How much further was Emory away from the wreck than Hotchkiss?

A. He was almost half the length of one sleeper, the length of the two chair cars, and half the length of the Jim Crow car north of where Uncle Joe was lying.

Q. That is all.

Cross-examination by Mr. TAYLOR:

Q. Did you see the body of the express messenger lying there on the east side of the track?

A. Yes sir, he was lying up on top of the wreck as I remember.

Q. And how far was he from where Hotchkiss, the one you call Uncle Joe, was?

A. Mr. West was in the wreckage.

243 Q. Did you know Mr. West?

A. I knew him by sight.

Q. And where did you first see him?

A. I couldn't recognize him; Mr. West's body was so mashed I didn't recognize him; they told me that is who it was.

Q. It is part of your business, isn't it, to adjust claims in cases of wrecks and so on?

A. Yes sir.

Q. How did you know there was going to be a wreck there?

A. I didn't know it.

Q. How did you happen to be on the train?

A. I was going to McAlester.

Q. Are you still working for the Company?

A. Yes sir.

Q. That is all.

(Witness excused.)

C. R. DAIGH, being first duly sworn, testified as follows on behalf of the defendant.

Direct examination by Mr. RAILS:

Q. State your name?

A. C. R. Daigh.

Q. Mr. Daigh, you are the same witness who testified here yesterday are you not?

A. Yes sir.

Q. And what is the name of the engineer pulling your train that collided with No. 5?

A. Lannihan.

Q. How long had he been pulling a freight train between Parsons and Muskogee?

A. I couldn't say exactly, a couple of years I guess, may be 244 longer.

Q. Do you know how long he had been an engineer on that line?

A. No sir, I couldn't say.

Q. And how long had you been a conductor, you say?

A. About six years.

Q. And you were well acquainted with Mr. Lannihan, were you?

A. Yes sir.

Q. You saw him just before you started out of Muskogee that day, did you?

A. Yes sir.

Q. I believe you stated yesterday he had the same kind of an order you had?

A. Yes sir.

Q. Now how was it that you and Mr. Lannihan happened to start out of here in violation of that order?

Mr. TAYLOR: We object as incompetent, irrelevant and immaterial.

Mr. RALLS: We offer to show by this witness this wreck was not caused by any gross negligence on the part of the engineer or the conductor.

By the COURT: Show what was done; let him answer.

A. It was a miscalculation of time.

Q. In what way, Mr. Daigh?

Mr. TAYLOR: We object as incompetent, irrelevant and immaterial.

By the COURT: Let him state what was done; objection sustained.

Q. Just explain then to the jury how the mistake occurred?

A. Well, to No. 5's time——

245 Mr. TAYLOR: We object as incompetent, irrelevant and immaterial.

By the COURT: Let him state, go ahead.

Mr. TAYLOR: The plaintiff excepts.

A. No. 5's time and all the rest of the trains I was to meet was miscalculated just an hour.

Q. By who?

A. By myself.

Q. It was a matter of calculation then?

A. Yes.

Q. How long had you been on this particular run as conductor?

A. You mean this division?

Q. Yes.

A. I had been down here about a couple of months I suppose.

Q. State whether or not you knew the schedule time of this Flyer known as No. 5 at that time?

Mr. TAYLOR: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection overruled.

Mr. TAYLOR: The plaintiff excepts.

A. Yes sir.

Q. Now then explain to the jury how it was, if you can, that this miscalculation was made, in what way?

Mr. TAYLOR: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection sustained.

Mr. RALLS: We offer to show by the witness that it was an oversight and not intentional on his part that the miscalculation was made.

246 Mr. TAYLOR: We object as incompetent, irrelevant and immaterial.

By the COURT: Objection sustained.

Mr. RALLS: The defendant excepts.

Q. Mr. Daigh, your train was going from Muskogee to what point?

A. Parsons, Kansas.

Q. State whether or not you were carrying loads from Muskogee to Parsons, Kansas, or other points beyond there?

Mr. TAYLOR: That is objected to on the grounds that fact- as respect to both trains have been admitted.

By the COURT: Objection overruled; let him answer.

Mr. TAYLOR: The plaintiff excepts.

Q. (Question read by stenographer.)

A. Yes sir.

Q. I ask you to state to the jury whether or not the oversight on this miscalculation of the time was wilfully done by you or not.

Mr. TAYLOR: We object as incompetent, irrelevant and immaterial, and calling for a conclusion.

By the COURT: Objection sustained.

Mr. RALLS: The defendant excepts.

Q. That is all.

Mr. TAYLOR: No questions.

(Witness excused.)

G. H. BOWERS, being first duly sworn testified as follows on behalf of the defendant.

Direct examination by Mr. ALLEN:

Q. State your name?

A. G. H. Bowers.

247 Q. What is your business, Mr. Bowers?

A. General Baggage Agent, for the M., K. & T.

Q. What was your business during the month of May, 1908.

A. Same business.

Q. Do you recollect the collision between train No. 5 and the freight train near Muskogee on the 15th day of that Month?

A. Yes sir.

Q. Did you know the express and baggage men on that train, Mr. West?

A. Very well.

Q. Do you know whether or not Mr. West was handling any baggage for the M., K. & T. on that road that day?

A. Yes sir.

Q. Do you know whether he had any baggage that was destined from some point in one State to a point in another State; that is baggage which passed over the State line?

A. He had baggage from Chetopa, Kansas, to Broken Arrow, Oklahoma; he had baggage from New York for Dallas, Texas, some 10 or 12 pieces; I recollect one lot of two pieces from Shreveport, Illinois, to Muskogee, Oklahoma.

Q. That is all.

Cross-examination by Mr. TAYLOR:

Q. Did he also have baggage between local points in Oklahoma?

A. I think he had some in Vinita; I got records from the agents of what they shipped on that train.

Q. Did he also have baggage from local points in Kansas?

A. I didn't look that up; I only looked up the baggage he received after he left Parsons.

Q. I mean he did carry baggage between local points?

A. That train usually did.

Q. That is all.

(Witness excused.)

248 A. J. MCKABE, being first duly sworn, testified as follows, on behalf of the defendant.

Direct examination by Mr. ALLEN:

Q. State your name?

A. A. J. McKabe,

Q. What is your business, Mr. McKabe?

A. Train Auditor.

Q. What railroad?

A. M., K. & T.

Q. What was your business May, 1908?

A. Train Auditor, same road.

Q. Were you the Auditor on the Katy Flyer that was in the wreck near Muskogee, May 15, 1908?

A. Yes sir.

Q. How long have you been working on the train as Auditor or any other business which would put you on trains?

A. About four years.

Q. While you have been engaged in the train service; have you had occasion to notice the effect of brakes on a train, or the application of brakes on a train?

A. Yes sir.

Q. I will ask you just what you felt with reference to the brakes, if anything, upon this particular train shortly before the collision?

A. Why they felt as though they were put on full, an emergency, they call it, emergency stop.

Q. Do you remember what you did, if anything?

A. Why I braced up.

Q. That is all.

249 Cross-examination by Mr. TAYLOR:

Q. Are you still working for the Company?

A. Yes sir.

Q. Did you talk to Mr. McClure, the claim agent about this case?

A. No sir.

Q. About the facts with respect to that brake?

A. No sir.

Q. That is all.

(Witness excused.)

F. E. GILES, being first duly sworn, testified as follows on behalf of the defendant:

Direct examination by Mr. ALLEN:

Q. State your name?

A. F. E. Giles.

Q. What is your business, Mr. Giles?

A. Civil engineer.

Q. What railroad?

A. M., K. & T.

Q. Did you make a map of the railroad track and the land in the immediate vicinity of our tracks and right-of-way near the Arkansas River bridge on down to the M., O. & G. crossing Muskogee?

A. Yes sir.

Q. Have you got that map with you?

A. Yes sir.

Q. Who made the survey upon which this map is compiled?

A. Why I was in person in charge of the party.

Q. State whether or not the map is correct?

A. Yes sir.

250 Q. Does that map indicate the points of the collision between the trains and other points with reference to the accident between two trains on May 15, 1908?

A. Yes sir.

Q. How did you get those points?

A. Mr. McClure was present with me at the time of the survey and pointed these places out to me.

Q. Are the tracks of any other railroad line in the vicinity of the M. K. & T. tracks along here?

A. Yes sir, M. O. & G. parallel the M. K. & T. on the east all the way.

Q. All the way from where to where?

A. Verdard to the M. O. & G. crossing.

Q. Does the map show the M. O. & G. tracks?

A. Yes sir; it is shown by two fine lines close together, and it is marked M. O. & G. in two different places near each end of the plat.

Mr. ALLEN: We offer the map in evidence as defendant's Exhibit "E".

Mr. TAYLOR: There is no objection.

Q. What is the distance from the bridge, Mr. Giles, to the point where the two trains collided?

A. It is 2192 feet.

Q. State whether or not there is any cut after leaving the bridge?

A. Yes sir, a slight cut there south of the bridge.

Q. Where is the cut with reference to the bridge?

A. It starts right at the end of the bridge and extends to about the point of the curve.

Q. What distance is that to the point of the curve?

A. 960 feet.

251 Q. What was the condition of the country outside of our right-of-way and to the east of our right-of-way inside of that curve?

Mr. TAYLOR: When did he make the map?

Q. When was this map made, Mr. Giles?

A. The map was made October 18, 1909; the survey October 14, 1909.

Q. What is the scale of the map?

A. 400 feet to the inch.

Q. Now what was the condition of the land outside of our right-of-way inside of that curve as to trees, etc.?

A. Well there is a lot of timber and bushes; some good size trees.

Q. You have got a letter marked "B" on the map with a star what does that indicate?

A. That was a point where Engineer Hotchkiss was lying.

Q. Who pointed that place out to you?

A. Mr. McClure.

Q. Then you have a point marked "C," north of "B", what does that indicate?

A. That was the point where Mr. Emory was lying.

Q. Who pointed that place out to you?

A. Mr. McClure.

Q. That is all.

Cross-examination by Mr. TAYLOR:

Q. Which is north on this map?

A. Right hand.

Q. This arrow points to the north?

A. Yes sir.

252 Q. How far are the tracks running parallel, the M. O. & G. and the Missouri, Kansas & Texas, apart, from center to center?

A. 150 feet.

Q. And the M. O. & G. track is on the outside of the curve?

A. Yes sir.

Q. How far is it from the south end of the bridge across the Arkansas River to the point of the accident as pointed out to you by Mr. McClure?

A. 2192 feet.

Q. Is there anything there to indicate that such as a road crossing?

A. Yes sir, a plank there at the crossing.

Q. A private crossing?

A. Yes sir.

Q. Now you say there is a slight cut there south of the bridge?

A. Yes sir.

Q. About how deep is that cut in the deepest place?

A. I think it is about three feet.

Q. And then it slopes down either way?

A. Yes sir.

Q. Now this growth on the inside of this curve is mostly brush, isn't it?

A. Well there is a mixture of brush and trees; some pretty good sized trees.

Q. Well there is one tree about 70 feet from the track, did you notice that in particular?

A. How far?

Q. About 70 feet from the railroad tracks?

A. Well I have two tree points marked here, and there was where I measured the highest.

Q. Have three trees?

253 A. Yes sir.

Q. How high are those trees?

A. At X they are 25 feet above the rail, at "Y" 12 feet.

Q. Well outside of those trees the rest of that was mostly brush, until you got further back?

A. West of "X" where this house is, is tall trees.

Q. That is further back from the track?

A. It is from the right of way fence back.

Q. How far back?

A. I didn't measure the distance; it is 500 or 600 feet possibly to that tree.

Q. And in between there is brush?

A. Mixture of brush and trees.

Q. Well there is no high trees in there?

A. Well I would not be positive about that, but I think there was some pretty good height of trees there.

Q. Did you take the elevation with respect to the ground at the bridge or was it just before you get to the bridge and three quarters of a mile or a mile south, which is the highest?

A. I don't know as I could answer that without refering to the profile.

Q. Well the ground all slopes to the River?

A. From the bridge south it is a down grade up a distance and it is practically level for a short distance, then it begins to raise and I expect it is higher at the point you speak of than it is at the bridge.

Q. Did you go back there a mile from the bridge on the top of that grade and look toward the bridge?

A. I think so; I was walking up and down there making the survey.

Q. From a point about here, about a mile back from the bridge on the top of this grade, could you see the bridge?

A. My recollection is I couldn't except the extreme top parts.

254 Q. You say your recollection is, do you know; did you go back there to see?

A. I didn't go back there for the express purpose of doing that.

Q. Then you have no recollection of looking especially to see that from that point? Isn't it a fact that the grade out there a mile south of that bridge is some 10 feet higher than it is before you get to the bridge?

A. I looked back from some point up here, I don't remember the exact location; only of this road crossing, I remember I could only see the top of the bridge on account of these trees.

Q. That was on account of those trees?

A. And some of this brush here inside of the right-of-way fence south of the bridge.

Q. There isn't any of that brush over 8 feet high?

A. Well the brush and the ground together stood up there 12 to 14 feet.

Q. Well that is back from the track?

A. Yes sir, outside the edge of the cut.

Q. Outside of the right-of-way?

A. No, inside the right-of-way.

Q. And that is on the highest part of the cut, is it?

A. Yes sir, all along in that cut.

Q. That is all.

(Witness examined)

W. V. McCLURE, recalled on behalf of the defendant.

Direct examination by Mr. ALLEN:

Q. You have heard the testimony of Mr. Giles, who has just been on the stand?

A. Yes sir.

255 Q. He indicated on the map certain points pointed out to him by you, I will ask you whether or not you pointed out to him correctly the places which was indicated upon the map?

Mr. TAYLOR: We object on the ground there is no proper foundation laid.

Q. You stated, I believe, in your previous examination that you were present at the wreck, didn't you, Mr. McClure?

A. Yes sir.

Q. And in your previous examination you testified as having seen Mr. Emory when he was getting up and having found Mr. Houchkiss lying near the wreck?

A. Yes sir.

Q. And also as to the location of the wreck?

A. Yes sir.

Q. Now I will ask you whether or not you indicated or pointed out to Mr. Giles, the surveyor, those particular locations? What did you do with reference to showing Mr. Giles those particular locations?

A. I took him down there for the purpose of making that survey and pointed out the places where these parties were lying when I first saw them, the tracks, right-of-way, etc., and everything that is made on that survey.

Q. Mr. Giles testified to the point where the collision occurred, did you point that out to him also?

A. I did.

Q. That is all.

Cross-examination by Mr. TAYLOR:

Q. Did you point out the road crossing as the place of the collision?

A. Yes sir.

256 Q. Right at the road crossing?

A. As near as we could figure it out it happened on a private road crossing; it used to be the old public road crossing there before the right-of-way was fenced.

Q. Did you point out the second road crossing from the bridge?

A. Yes sir, I can point out the public road crossing at this time.

Q. That is all.

(Witness excused.)

Mr. ALLEN: That is our case.

Mr. TAYLOR: The plaintiff closes.

Whereupon the court read the instructions to the jury, and the cause was argued by counsel for the plaintiff and the defendant.

The above and foregoing is all of the testimony introduced on the trial of the above entitled and numbered cause.

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PLAINTIFF'S EX. No. 1.

Form 31. Missouri, Kansas & Texas Railway System. Form 31.

Train Order No. 33.

PARSONS, 5/15, 1908.

To 2nd 404 & No. 412, at — Station.

x — — —, Operator.

— M.

2nd 404 eng. 562 will wait at Gibson until 11:50 A. M. for Exa. 584 South. Exa. 584 south has right over No. 412 eng. 120 to Muskogee.

E. M. G.

Conductor and Engineman must each have a copy of this Order.

(Admitted in evidence p. 128.)

Repeated at —. O. K. 10:5 A. M.

Conductor.	Train.	Made	Time.	Operator.
Murphy	2/404	Comp.	10:50 A.	Cully.
Daigh	412	Comp.	11:26	Cully.

PLAINTIFF'S EXHIBIT No. 1-a.

Form 31. Missouri, Kansas & Texas Railway System. Form 31.

Train Order No. 34.

PARSONS, 5/15/1908.

To all Conc'd, at Yd. Station.

x — — —, Operator.

— M.

No. 5 eng. 312 will wait at Wagoner until 11:45 A. M. for 2nd 404 eng. 562 and will run 40 mins. late Wagoner to Muskogee.

E. M. G.

Conductor and Engineman must each have a copy of this Order.

(Admitted in evidence p. 128.)

Repeated at —. O. K. 11:15 A. M.

Conductor.	Train.	Made.	Time.	Operator.
Berry	YM.	Comp.	11:17 A.	Cully.
Daigh	412	Comp.	11:26 A.	Cully.

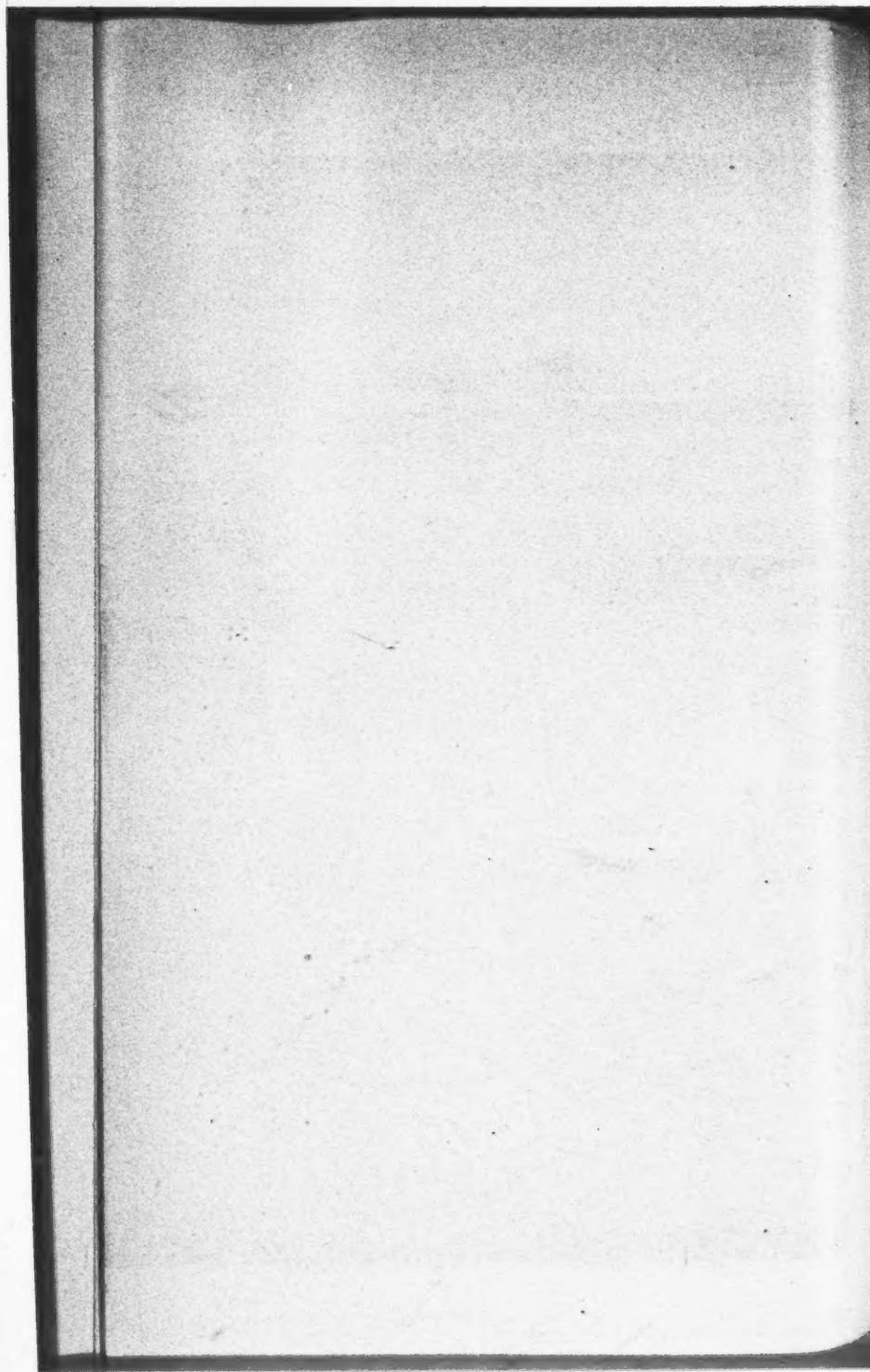
Oct. 6: 703
Mammals in Indiana
4. 139





Off to the
1917





258

PLAINTIFF'S EX. No. 1-b.

Form 31. Missouri, Kansas & Texas Railway System. Form 31.

Train Order No. 36.

PARSONS, 5/15, 1908.

To 412, at Yd. Station.

x ———, Operator.

— M.

No. 413 eng. 614 will wait at Verdank until 12:45 P. M. for No. 412 eng. 120.

E. M. G.

Conductor and Engineman must each have a copy of this Order.

(Admitted in evidence p. 128.)

Repeated at——. O. K. 10:30 A. M.

Conductor.	Train.	Made	Time.	Operator.
Daigh	412	Comp.	11:30 A.	Cully.

Defendant's Exhibit- "A" and "B" are copied in and made a part of Defendant's Third Amended Answer.

(Here follow photos, marked pages 259 and 260.)

EXHIBIT "C."

American Express Company.

Application for Situation.

Rules Governing Employment by This Company.

[On left margin:] Def't's Exhibit "C" Offered in evidence, p. 168.

Any person desirous of engaging in the service of this Company, must before appointment personally fill out and execute this form of Application, obtain satisfactory Life Insurance (unless already insured), and, if required, enter into Bonds with the Company for the faithful discharge of his duties, as per conditions fixed by the Company and in force at date of his employment or as may be fixed from time to time thereafter and made applicable in any renewal of Bond during his employment by Company, and which conditions he is required to inform himself upon. Parties appointed to represent this Company and engaged in other business, are not expected to comply with these rules unless they wish to do so.

Parties employed by this Company are hereby notified that they are not engaged for any particular length of time, and the Company reserves to itself the right to terminate the services of any Employé at pleasure; and the party executing this Application does hereby acknowledge and agree to abide by such notices and conditions, and accepts employment subject to being discharged

262 at any time by the Company or its Agents.

New York, Nov. 1892.

1. Name in Full. Wm. B. West.
2. Where Born.
3. Age. Years. Nationality.
4. How long did you reside in your native place.
5. Married or single. Residence.
6. If married, where does your family reside?
7. Please fill out the following blanks giving dates of your employment and names of employers during the past ten years:
 From (What Date)
 To (What date)
 Employed as
 At Address
 In service of (Name of Employer or Corporation)
 Under (Name of Manager, Supt. or Head of Department).
 For answers and References see former application.
8. What was the cause of each termination of employment.
9. Have you ever been discharged from any situation or other engagement? If so, state particulars.
10. How have you been occupied since your last employment terminated.

11. Has anything occurred in your past history that would in any manner jeopardize your standing with, or reflect discredit upon this Company in case it was discovered? If so, what?

12. Have you any imperfection of the arms, hands, legs or feet? If so, what

13. Are you now in good health.

14. Is your eyesight good

15. Is your hearing good.

16. Have you ever had any serious illness What When

Where

17. What physician attended you

18. Have you ever received any injury What When Where

19. What surgeon attended you

20. Are you addicted to the use of stimulants, or intemperate in the use of alcoholic beverages?

21. Is your life insured? If so, state for what amount for how long a time, and in what Company.

22. Please give particulars respecting parents and nearest relatives, if living, as follows:

Name of father

Address

Business.

Name of Mother

Name of nearest male relative of Father's side

Address

Name of nearest male relative on Mother's side

Address

23. Please give below the names and address of as many persons as possible for references, not less than five, who are not related to you.

Name.

Occupation.

Post-Office address.
No. of street, if in city.

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.

24. Bond required for \$— subject to and in accordance with the Rules and Regulations of the American Express Company.

Dated at Parsons State of Kas. the 18 day of Oct 1893

(Signature of applicant)

W. B. WEST.

Description of Person Employed.

(To be made out by Sup't or Agent employing.)

Height feet inches form

Weight lbs. Complexion.

Color of hair color of eyes kind of nose.

If any hair is worn on face, in what manner.

What color

State fully any particular marks or deformity that would be readily recognized

Last Photograph taken, attached.

I hereby certify that to all appearances the above description and foregoing statements are correct, and that the photograph attached hereto is a good likeness of applicant.

Supt. or Agent Employing the Party.

Remarks.

(Under head of Remarks the Sup't or Agent will give any facts he may think worthy of recording for future reference.)

265

Accident Release.

Whereas, I, the undersigned, have entered, or am about to enter, the employment of the American Express Company, and in the course of such employment may be required to render services in the care, carriage or handling of merchandise and property in course of transportation by cars, vessels and vehicles belonging to the different railroads, stage and steamboat lines upon which the Company relies for its means of forwarding property delivered to it to be forwarded:

And Whereas, such Express Company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be obliged to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employees:

Now, Therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or persons engaged in any manner in operating any railroad or vessel, or vehicle, or of any employé of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representative, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence

266 of any person or corporation, or of any employé of any person or corporation, or otherwise.

And I hereby bind myself, my heirs, executors and administrators with the payment to such Express Company, upon demand, of any sum which it may be compelled to pay in consequence of any such

claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

I do hereby ratify all agreements heretofore made by said Express Company with any corporation or persons operating any railroad, stage and steamboat line in which such Express Company has agreed in substance that its employes shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements, in so far as the provisions thereof relative to injuries sustained by employes of the company are concerned, as fully as if I were a party thereto.

And I do hereby authorize and empower said Express Company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine with any corporations or persons operating any railroad, stage and steamboat
267 line, for my transportation as a messenger or employe free of charge, upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employe of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and of all persons upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks, of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said Company, or any of its members, officers agents, or employes, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said Company a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators with the payment to said Express Company, on demand, of any sum which it may be compelled to pay in
268 sequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

Witness my hand and seal this 18 day of Oct. one thousand eight hundred and 93.

W. B. WEST.

_____,
Parent or Guardian.

In the presence of:
J. A. JUNE.

NOTE.—If applicant is under age his guardian must also sign this release.

Agreement as to Bonding and Losses by Carelessness, Negligence or Defalcation.

This agreement, made this — day —, A. D. 189— between ——— hereinafter called the "Subscriber" and The American Express Company, hereinafter called the "Company".

Witnesseth: I. That the Subscriber to this agreement, an employé in the service of said Company, in consideration of the wages paid or to be paid to him by the said company, hereby agrees with the said Company that he will at all times hereafter keep just, true and correct accounts of all business of said Company, coming into his hands as such employé or otherwise; and will make and forward to the proper officers of said Company full, true and correct statements of the accounts of the business of said Company so coming to his hands; whenever the same shall be required by the rules and regulations of said Company, or by any officer of said Company

269 and will in like manner make true, full and correct statements showing the correct state of his accounts as such employé, at the end of each and every month, or as often as required; and will collect all dues and all sums of money due and payable, or which may become due and payable, to said Company, which he shall be required to collect as such employé by the rules and regulations of said Company; and will duly pay over to said Company or authorized agent thereof all sums of money that are now due from him to said Company, or that may hereafter become due, or that may in any manner come into his hands as such employé and belonging to said Company, whenever required by the rules and regulations of said Company, or any officer thereof; and will do and perform all and singular the duties of such employé that now are, or may hereafter be lawfully imposed upon such employé of said Company and attend diligently and faithfully thereto.

II. And the Subscriber hereto expressly agrees that, if in any action at law or in equity brought upon this agreement, or if in any legal proceedings whatever, it should become necessary to show the amount of money or other property of said Company, or in which it should have any interest, at any time in his possession or control, or in any manner chargeable to him, the books, papers and records of said Company, including the printed or written instructions and circulars of any of the officers thereof, to its Agents, shall

be admitted as competent evidence of whatever may therein be contained, without any other evidence of their authenticity than proof by some officer or stockholder of the Company, that they are in fact the books, papers, records instructions or circulars thereof, or of its officers; and the evidence of any officer or stockholder of the

Company shall not be excluded because of any pecuniary interest he may have in such action or proceeding.

III. And the Subscriber hereto further agrees to pay to the said Company from year to year, when called upon, so long as he shall remain in its service, such sum as the said Company may consider necessary to protect it from loss on account of any act, negligence or default of his, not exceeding, however, the rate per year fixed by the General Rules and Instructions of the Company relative to Bonding and Premium for employés of the same class performing the same duties. And the moneys so paid by the Subscriber hereto, together with similar amounts paid by other employés of the Company, shall constitute a fund to secure the company against loss by negligence, carelessness, dishonesty or disregard of the company's rules and instructions, on the part of any of its employés contributing to said fund, and may be applied by the said Company to make good any such loss.

The disposition of the said fund shall be governed by the provisions of the company's rules and instructions in force from time to time, relative to Bonding and Premiums.

No moneys so paid, or any part thereof, shall be returned in any case to said subscriber or any other employé, except upon the terms and conditions provided for the return of premiums in and by said rules and instructions.

IV. And it is also agreed that in case the Subscriber hereto shall quit the service of the said Company, the Company shall have the right to withhold any moneys which may be due him until after a reasonable time for an examination of his accounts as such employé, has elapsed, and that the same may be retained by the Company and applied in payment of any claims made against the Company, which after due investigation are determined by the Company to be proper to be paid by the Subscriber hereto—on account of negligence or otherwise—and it is further agreed that salary due at any time may be applied in payment of errors in accounts rendered to the Company the Subscriber hereto.

(Sign name in full.) X. W. B. WEST. [SEAL.]

Witness:

J. A. JUNE.

Rules for Bonding, with Conditions, Rates, and Regulations of the Company Governing the Same, Subject to Changes at any Time, on Notice to be Given Employés Through the Monthly Circular Issued from the President's Office.

1st. Bonds, whenever made, must expire on the following first day of May.

a. Reports of Premiums paid May 1st of each year on Employé's bonds must be made as soon after that date as possible, on Form 130, entering names in alphabetical order and numbering consecutively. Thereafter reports of Surety Fund Receipts (Premiums and Losses recovered) and Disbursements (Refunds and Losses) must be made monthly, giving the number of the bond in each and every case.

272 Notice of cancellations of Bonds must be given in all cases.

b. All premiums collected from employés—regular extra or temporary—must be remitted to General Superintendent for settlement with the Treasurer and not credited through Way-bill statements.

Where the Company has been paying the whole or any portion of premiums, the practice, when necessary, may be continued, as per standing instructions, and such payments entered in column "paid by Co." but must not be remitted.

2nd. The amount of Bonds must be in accordance with the following scale:

Employee's salary or commission.	Per month.	Amount of bond.
Not exceeding.....	\$8.33	\$300
Over \$8.00 and not exceeding.....	10.00	500
" 10.00 " " ".....	15.00	700
" 15.00 " " ".....	35.00	1,000
" 35.00 " " ".....	50.00	1,500
" 50.00 " " ".....	60.00	2,000
" 60.00 " " ".....	70.00	2,500
" 70.00 " " ".....	75.00	3,000
" 75.00 " " ".....	90.00	3,500
" 90.00 " " ".....	100.00	4,000
" \$1,200 per year		5,000

EXCEPTIONS.—Bonds when required of Porters or Drivers who do not handle or deliver Money Packages may be fixed at the uniform amount of \$500. each.

No bonds for less than \$500. will be accepted from Employés who may sell Money Orders.

Branch Money Order Agents, not otherwise in the service of the Company, must give bonds for amounts equal to face value
273 of the Money Orders in their hands at any one time.

Bonds reduced by losses in excess of \$100, if employé is thereafter retained in service of the Company, must be restored to

original amount and premiums paid from date of loss to expiration of Bond.

3d. The cost of Bonding will be on the basis of the following:

Premium Table.

No. of Month.	Bond for \$.00	Bond for \$500	Bond for \$700	Bond for \$1,000
1	20	30	40	60
2	40	60	80	1.20
3	60	90	1.20	1.80
4	75	1.20	1.60	2.35
5	90	1.45	2.00	2.90
6	1.00	1.70	2.40	3.40
7	1.20	2.00	2.75	3.95
8	1.35	2.25	3.15	4.50
9	1.50	3.55	3.55	5.05
10	1.70	2.80	3.95	5.65
11	1.85	3.10	4.35	6.20
12	2.00	3.40	4.75	6.75

NOTE: Fractional parts of a month considered as a whole month.

4th. Men temporarily employed for a period of thirty days, or less, to fill positions of employes absent and under pay, will be held as working under the bond of such absentee, whose bond will be liable to the Company, in case of loss during such time. When
274 such men are employed for a period longer than thirty days they must be regularly Bonded.

Men temporarily employed for a period of thirty days or less, not filling positions of absent parties, if required to give Bond, will be charged with a premium and the same deducted from their pay as follows:

Bond for—	Bond for—	Bond for—	Bond for—
\$300	\$500	\$700	\$1000
<hr/> 25¢	<hr/> 40¢	<hr/> 55¢	<hr/> 75¢

When such men are employed for a period longer than thirty days they must be regularly bonded.

5th. All losses sustained by the Company as the result of dishonesty, or carelessness of, or disregard of the Company's instructions by, Employes Bonded will be paid from the Premium Fund and must be charged up accordingly.

6th. Unearned Premiums for the unexpired term of Bonds will be allowed Employes voluntarily withdrawing from the service, or whose services the Company does not longer require, 30 days after day of cancellation of bonds, in accordance with the following:

Table of Refund of Premiums for the Unexpired term of Bonds.

275

Unexpired term of bond.	Amounts refunded on bonds of—			
	\$300	\$500	\$700	\$1,000
1 month.....	.....	.....	.....	.....
2 months.....	.....	.....	.....	.....
3 months.....	.....	.....	.....	.....
4 ".....	20 cts.	40 cts.	55 cts.	75 cts.
5 ".....	40	75	1.05	1.50
6 ".....	65	1.15	1.60	2.25
7 ".....	85	1.50	2.10	3.00
8 ".....	1.10	1.90	2.65	3.75
9 ".....	1.30	2.25	3.15	4.50
10 ".....	1.55	2.65	3.70	5.25
11 ".....	1.75	3.00	4.20	6.00

No fractional parts of a month will be considered.

No unearned premium will be returned to persons discharged from the Company's service, or through whose carelessness, dishonesty or disregard of the Company's instructions, losses are sustained.

7th. Any surplus or premium over and above the losses and expenses sustained in connection therewith during the year will be refunded by the Company at the expiration of each year, to persons then in the service, on a pro rata basis of the Premium Payment made by each. No surplus will be refunded to persons leaving or discharged from the service of the Company during the year, or through whose carelessness, dishonesty or disregard of the Company's instructions, losses are sustained.

	Endorsed on back as follows: No.	Application
276	For Situation of William B. West	Parsons Kans.
	Position, Driver. Dated 189 .	

This application must be sent to General Superintendent attached to the Notice of Appointment of Employé.

The General Superintendent must note on appointment blank (form 103) before forwarding same to Auditor, that the Application (form 203) duly executed, is on file at his office, otherwise voucher for the first month's pay of a new employé will not be passed by General Accounting Office.

Deft. Ex. "C."—No. 329.



MAPS

TOO

LARGE

FOR

FILMING



277

ST. LOUIS, Mo., July 21st, 1897.

To Joint Messengers & Baggage-men,
On M., K. & T. Lines,

GENTLEMEN: In some instances I find there has been considerable controversy between messengers and train crews on joint runs in regard to your duties to the railroad company. Inasmuch as the railroad company pay a portion of your salary you are just as much an employé of the railroad on which you run as you are of the express company, and you must be just as careful of their interests as you are of this Company and perform your duties to that Company, as near as possible, in the same manner that they would be performed by exclusive baggage-men. In the event of any controversy between yourself and flagmen, or porters, you should refer the matter to the conductor and carry out his instructions.

There has been some difficulty in regard to the handling of train boxed in baggage cars, some messengers insisting that there was not room in the baggage end of the car, and they should be carried on the platform. It does not matter where the space in your car is, in the express or baggage end, if there is room in the car anywhere the box should be carried there, if requested to do so by the train men.

There is no reason why the joint business cannot be handled successfully and in harmony with the train crews and I want you to take up with the Train Master of your Division, or the General Baggage Agent, any matter of interest of the railroad company. Any difficulties between yourself and train men can, and unquestionably will be settled by the conductor in charge of the train, if appealed to. There is no disposition on the part of either company, in whose service you are, to impose upon you duties that you cannot perform, and I know very well that the Superintendents and Train Masters of the Railroad Company will sustain you where it is shown that you are endeavoring to perform your duties satisfactorily.

There has been no serious complaint *out* but it must be understood that the instructions of the railroad company are to be complied with where the same do not conflict with the standing rules of this company in regard to the care of money and valuables.

Yours truly,
(Signed)

F. D. ADAMS,
Superintendent.

Defendants Ex. "D" Offered in Evidence p. 125.

(Here follows diagram marked page 278.)

279 The above and foregoing is all of the testimony offered and all of the testimony introduced at the trial of the above entitled and numbered cause.

280 And thereupon and at the close of all the testimony in the case in the presence of the jury and before the jury had retired from the bar of the court, in the proper time and in the proper manner, the defendant by its counsel moved the court in writing to give to the jury each and all of the following instruction:-

281

No. 1.

The Court instructs the jury to find the issues in favor of the defendant.

Requested by Defendant.

CLIFFORD L. JACKSON,
W. R. ALLEN,
J. G. RALLS,

Attorneys for Deft.

Refused and Defendant excepts.

. JOHN H. KING, *Judge.*

No. 2.

If you find from the evidence in this case that the deceased W. M. West was not an employé of the Defendant then the defendant would not be liable unless you should further find that the defendant was guilty of gross negligence and that as a result of such negligence the deceased was killed.

Requested by Defendant.

CLIFFORD L. JACKSON &
ALLEN AND J. G. RALLS,

Attorneys for Def.

Refused & Defendant Excepts.

JOHN H. KING, *Judge.*

282 If you find from the evidence in this cause that the said W. B. West was employed by the defendant as baggage master and was acting as such at the time of his death you will find the issues in favor of the defendant.

Requested by Def't.

CLIFFORD L. JACKSON &
W. R. ALLEN AND
J. G. RALLS,

Att'ys for Deft.

Refused & Def't Excepts.

JOHN H. KING, *Judge.*

4.

If you find from the evidence in this cause that the deceased W. B. West was an employé of the defendant, at the time he received the injuries which caused his death, and that as such employé he was engaged in interstate commerce, as hereafter explained, then the laws of the United States would govern the liability of the defendant herein.

Requested by Def't.

CLIFFORD L. JACKSON,
W. R. ALLEN &
J. G. RALLS,
Att'ys for Def't.

Refused & Defendant Excepts.

JOHN H. KING, *Judge.*

5.

If you find from the evidence in this action that the deceased W. B. West at the time he received the injuries which caused his death was not an employee of the Defendant, and if you further find that the deceased W. B. West entered into the contract introduced in evidence stipulating for a release of the defendant
283 then your verdict should be for the defendant.

Requested by Defendant.

CLIFFORD L. JACKSON,
W. R. ALLEN &
J. G. RALLS,
Attorneys for Def't.

Refused & Defendant Excepts.

JOHN H. KING, *Judge.*

7.

If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained and you are not to permit your sympathy to influence your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish. Your verdict must be based upon the financial loss in dollars and cents.

Requested by Def't.

CLIFFORD L. JACKSON &
W. R. ALLEN &
J. G. RALLS,
Attorneys for Def't.

Modified & Given. Defendant Excepts.

JOHN H. KING, *Judge.*

No. 8.

If you find for the plaintiff your verdict must not exceed ten thousand dollars.

Requested by Def't.

CLIFFORD L. JACKSON.
W. R. ALLEN.
J. G. RALLS.

Refused & Defendant Excepts.

JOHN H. KING, *Judge.*

284

6.

If you find from the evidence that the train upon which West was working was at the time of his death engaged in commerce between the states and that he was an employee of the defendant, the plaintiff is not entitled to recover.

CLIFFORD L. JACKSON,
Att'y for Def't.

Refused & Defendant Excepts.

JOHN H. KING, *Judge.*

Endorsed on back as follows: #329. Instructions asked by Def't & Refused. State of Oklahoma, County of Muskogee. Filed Mar. 30, 1910. W. P. Miller, District Clerk.

285

Which said instructions requested by the defendant and refused by the Court were, on the day last aforesaid, duly filed in said cause and made a part of the record herein, but the Court refused to give to the jury said instructions asked by the defendant, and numbered 1, 2, 3, 4, 5, 6, 7, and 8, and refused to give each of said instructions, to which action of the court in refusing to give said instructions numbered 1, 2, 3, 4, 5, 6, 7, and 8, and in refusing to give each of them, the defendant then and there in the presence of the jury and before the jury had retired from the bar of the court, duly excepted at the time, and the court at the time of refusing each of said instructions wrote at the close of each of them "Refused and Defendant excepts", and the Judge of said Court at said time signed the same as hereinbefore set forth. All of which said instructions were filed on the day last aforesaid and made a part of the record herein.

286

And thereupon the Court upon its own motion instructed the jury as follows:

287

No. 329.

IVOLUE B. WEST, Plaintiff,

vs.

THE MISSOURI, KANSAS & TEXAS RAILWAY Co., a Corporation, Defendant.

Charge of the Court.

I

GENTLEMEN OF THE JURY: You are instructed that this action is brought by the plaintiff as the widow of William B. West for the benefit of herself as such widow and of the minor children of herself and of said William B. West, deceased, for the alleged negligent killing of her husband while he was running upon one of the defendant's trains as an express messenger in the employe of the American Express Company.

Plaintiff alleges that at and prior to the time of the death of said William B. West he was employed by the American Express Company as a messenger, upon the express cars operated by the defendant company over its line of railroad between Parsons, Kansas, through the State of Oklahoma to points beyond in the State of Texas. That in addition to his duties as express messenger said West was also engaged in handling passenger baggage upon the express cars of the defendant company. That on May 15, 1908, at about 12 o'clock, noon, of said day, said William B. West in the course of his employment, was riding in one of the express cars of the defendant company, then being operated by defendant over its railroad in a southerly direction through the State of Oklahoma upon its train known as the "Katy Flyer." That when said

288 train reached a short distance south of the Arkansas river between the stations of Verdard and Muskogee, said train through gross carelessness and negligence upon the part of the railroad company and while said train was running at a high and dangerous rate of speed, caused and allowed to collide in a head end collision with a locomotive and freight train, also owned, maintained and operated by said defendant Company and which freight train was also through the gross negligence and carelessness of said defendant company being run and operated by said defendant company upon the same track, in a northerly direction, at a high and dangerous rate of speed, and that the said William B. West was by said collision and by the gross carelessness and negligence on the part of the defendant and without any fault or neglect upon his part was then and there caused to sustain and receive personal injuries which resulted in his immediate death. Plaintiff brings suit in the sum of \$50,000.00 for said killing.

The defendant has filed an answer which after denying each and every material allegation in plaintiff's petition, avers that if the said William B. West was injured and killed at the time, and place and

in the manner alleged his death was not due to any negligence on the part of the defendant, or any of its servants, agents or employes, but was due solely to the negligence on the part of the said William B. West. Defendant further alleges in its answer that the defendant before entering into the service of this company had executed two certain contracts to the American Express Company by which claim- for damages for injuries were waived and released and in which contract he agreed to release any railroad on which he might be working at the time of any injury and that the plaintiff is now barred from maintaining this action.

Given and def't. excepts.

JOHN H. KING, *Judge*.

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2.

You are further instructed that the jury are the sole judges of the weight of the testimony and credibility of the witnesses, but the law of the case is that which is given to you by the Court in these instructions, and you are to be governed by no other law. In determining the weight of the testimony and credibility of the witnesses you have the right to look to each witness as he conducted himself while upon the witness stand, to his fairness or lack of fairness, to his intelligence or his incapacity as the same appeared to you, to his interest in the case, if any, and you have the right to look to each and every surrounding circumstance that appears in the testimony. If there is a conflict between the different parts of the testimony of any witness it is your duty to reconcile the same, if this can be done, upon the theory that each witness has spoken the truth; but if this cannot be done then you may disregard any part of the testimony of any witness, or all of his testimony, as you may see fit under the surrounding facts and evidence in the case. If you believe from the evidence that any witness has wilfully testified falsely to any fact material to the issues in this case, then you are at liberty to disregard any part or the whole of the testimony of such witness.

Excepted to by Def't. Given.

JOHN H. KING, *Judge*.

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3.

The burden is upon the plaintiff to sustain her contention by a preponderance of the testimony—By this is meant by the greater weight of the testimony, and not necessarily the number of witnesses testifying upon the one side or the other.

Obj. to by Def't. Given & Def't excepts.

JOHN H. KING, *Judge*.

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4.

You are instructed that it is the duty of a railroad company to so conduct, maintain and run its trains used in its business in such a manner as to prevent injury to persons riding on said trains.

Given and Def't Excepts.

JOHN H. KING, *Judge*.

4½.

By "ordinary care" as that term is used in these instructions, is meant that degree of care which a person of reasonable prudence and caution would likely use and exercise under the same or similar circumstances and conditions, and a failure to use such care is negligence on the part of the person or corporation guilty of such failure. That is to say: negligence is the failure to do or perform some act or the doing of some act which, from the nature of the act and under the circumstances, may result in injury or damage to the person or property of others, and which a person of reasonable prudence would or would not do, as the case may be, under the same or similar circumstances, and the rule here stated, applies equally to persons and corporations, the latter, that is, corporations, being chargeable with the negligence, if any, committed by their officers, agents and employes, in the discharge of their duty as such.

Given and Def't Excepts.

JOHN H. KING, *Judge*.

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5.

Now bearing in mind these instructions and applying them carefully to the evidence before you, if you believe and find from a preponderance of the testimony that on or about the 15th day of May, 1908, in the County of Muskogee, William B. West was personally injured by being in a wreck caused by a collision between the "Katy Flyer" and one of defendant's freight trains on its line of railroad south of the Arkansas River bridge, and you further find that such injury was the direct or proximate result of the negligence of the defendant, its agents, officers or employes to properly conduct and run its trains on said railroad track; that is, if you so find and believe that the injury sustained by William B. West was the direct or proximate result of the failure of defendant, its officers, agents or employes to exercise that degree of diligence and care to prevent injury to others as a person of ordinary caution and prudence would likely have used under the same or similar circumstances, and you further find that such injury caused the death of the said William B. West, then it will be your duty to return a verdict in favor of the plaintiff herein for such sum, as, in your judgment, the evidence shows her to be entitled to under other instructions given you in this case.

Given & Def't Excepts.

JOHN H. KING, *Judge*.

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6.

If you find for the plaintiff in this case, than in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what probably would have been his life time if he had not been killed, so far as these matters

have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition.

Given and Def't except.

JOHN H. KING, *Judge*.

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7.

Nine of the jury concurring is sufficient to return a verdict for plaintiff or defendant, and if the verdict is rendered by nine or more, but by less than the whole number of jurors, then the jurors who concur in the verdict must sign their names thereto. If the verdict is concurred in by the entire jury, then you will select some one of your number foreman and have him sign the verdict as such foreman and return it into Court.

JOHN H. KING, *Judge*.

Endorsed on back as follows: #329. Instructions. State of Oklahoma. County of Muskogee. Filed Mar. 30, 1910. W. P. Miller, District Clerk.

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On the back of said instructions so given by the court on its own motion to the jury, omitting the title of said cause, appears the following endorsement: "#329. Instructions State of Oklahoma County of Muskogee. Filed Mar. 30, 1910. W. P. Miller, District Clerk".

To the giving of said instructions numbered 1, 2, 3, 4, 4½, 5, 6, and 7, given by the court to the jury on its own motion, and to the giving of each of said instructions and to each and every part thereof, the defendant then and there in the presence of the jury and before the jury had retired from the bar of the Court, duly excepted at the time, and the court at the time of the giving of said instructions and each of them wrote on the margin of each of them "Given and defendant excepts", and the Judge of said Court at said times signed the same as hereinbefore set forth, all of which said instructions, were signed by the Judge and filed on the day last aforesaid as a part of the record herein. The above and foregoing instructions numbered 1, 2, 3, 4, 4½, 5, 6, and 7 given to the jury by the court on its own motion are all of the instructions that were given to the jury.

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That thereafter and after the argument of counsel the jury retired in charge of a sworn officer of said court, to consider their verdict.

That thereafter and on the same day, to-wit: the 30th day of March, 1910, the jury returned into open court their verdict in said cause, which said verdict is in words and figures as follows, to wit:

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#329.

IVOLUE B. WEST, Plaintiff,

vs.

THE MISSOURI, KANSAS & TEXAS RY. CO., Defendant.

Verdict.

We, the jury duly empaneled and sworn in the above entitled cause upon our oaths find the issues in favor of the plaintiff and that she should recover of and from the defendant the sum of \$15,000.00.

R. V. ANDERSON, *Foreman*.

Endorsed on back as follows: #329. Verdict. R. State of Oklahoma, County of Muskogee. Filed Mar. 30, 1910. W. P. Miller, District Clerk.

298 To the making and rendering of said verdict and each and every part thereof, the defendant then and there duly excepted at the time.

That thereafter and on to wit; the 1st day of April, 1910, and within three days after the rendition of said verdict as hereinbefore set forth, and during the February, 1910, term of said Court, said defendant filed in said court its motion in writing, for a new trial, which said motion is in words and figures as follows, to wit:

299 In the District Court, Third Judicial District, Muskogee County, State of Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Motion for New Trial.

Comes now the defendant in the above entitled cause, and by its attorneys, and moves this Honorable Court for a new trial, and prays that it be granted a new trial for the following causes, each and all of which materially affect its substantial rights:

I.

For the reason that the damages awarded by the jury were excessive and appear to have been given under the influence of passion and prejudice, and in support of this assignment of error defendant alleges that the jury did not deliberate upon their verdict to exceed twenty minutes, and after retiring to their jury room to deliberate upon their verdict returned their verdict into court within

twenty minutes after the case had been submitted to them for deliberation; and defendant asserts that it was impossible within the short time above stated for them to consider the evidence in the case, and that the evidence in the case was not considered by the jury.

II.

300 For the reason that the verdict of the jury is not sustained by sufficient evidence.

III.

For the reason that the verdict of the jury is without evidence to support it.

IV.

For the reason that the verdict of the jury is contrary to law.

V.

For errors at law occurring at the trial and excepted to by the defendant.

VI.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 1, to which refusal of the Court the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 1, requested, being as follows:

"The court instructs the jury to find the issues in favor of the defendant."

VII.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 2, to which refusal of the court the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 2, requested being as follows:

301 "If you find from the evidence in this case that the deceased, W. B. West, was not on employé of the defendant, then the defendant, would not be liable unless you should further find that the defendant was guilty of gross negligence, and that as a result of such negligence the deceased was killed."

VIII.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 3, to which refusal of the court the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 3 requested being as follows:

"If you find from the evidence in this case that the said W. B. West was employed by the defendant as baggage master, and was act-

ing as such at the time of his death, you will find the issues in favor of the defendant."

IX.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 4, to which refusal of the court the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 4 requested being as follows:

"If you find from the evidence in this cause that the deceased, W. B. West, was an employé of the defendant, at the time he received the injuries which caused his death, and that as such employé he was engaged in interstate commerce, as hereafter explained, then the laws of the United States would govern the liability of the defendant herein."

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X.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 5, to which refusal of the court the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 5 requested being as follows:

"If you find from the evidence in this action that the deceased, W. B. West, at the time he received the injuries which caused his death was not an employé of the defendant, and if you further find that the deceased W. B. West, entered into the contract introduced in evidence, stipulating for a release of the defendant then your verdict should be for the defendant."

XI.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 6, to which refusal of the court the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 6, requested being as follows:

"If you find from the evidence that the train upon which West was working was at the time of his death engaged in commerce between the States, and that he was an employé of the defendant, the plaintiff is not entitled to recover."

XII.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 7, to which refusal of the court the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 7 requested being as follows:

"If you should find for the plaintiff, your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained and you are not to permit your sympathy to influence your

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verdict. The plaintiff is not entitled to recover for loss of the society of deceased, nor for mental anguish. Your verdict must be based upon the financial loss in dollars and cents."

XIII.

That the Court erred in refusing to give to the jury at the request of the defendant the written instruction requested by it, and numbered 8, to which refusal of the Court the defendant then and there objected and excepted, and still objects and excepts, said instruction 8 requested being as follows:

"If you find for the plaintiff your verdict must not exceed ten thousand dollars."

XIV.

The court erred in instructing the jury in accordance with his instructions, numbered 1, which was given to the jury, to the giving of which instruction the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 1, being as follows:

304 "You are instructed that this action is brought by the plaintiff as the widow of William B. West for the benefit of herself as such widow and of the minor children of herself and of said William B. West, deceased, for the alleged negligent killing of her husband while he was running upon one of the defendant's trains as an express messenger in the employ of the American Express Company.

"Plaintiff alleges that at and prior to the time of the death of said William B. West he was employed by the American Express Company as a messenger, upon the express cars operated by the defendant company over its line of railroad between Parsons, Kansas, through the State of Oklahoma to points beyond in the State of Texas. That in addition to his duties as express messenger said West was also engaged in handling passenger baggage upon the express cars of the defendant company. That on May 15, 1908 at about 12 o'clock noon, of said day, said William B. West in the course of his employment, was riding in one of the express cars of the defendant company, then being operated by defendant over its railroad in a southerly direction through the State of Oklahoma upon its train known as the "Katy Flyer." That when said train reached a short distance south of the Arkansas River between the stations of Verdard and Muskogee, said train through gross negligence and carelessness upon the part of the railroad company and while said train was running at a high and dangerous rate of speed, caused and allowed to collide in a head end collision with a locomotive and freight train, also owned, maintained and operated by said defendant company and which freight train was also through the
305 gross carelessness and negligence of said defendant company being run and operated by said defendant company upon the same track, in a southerly direction, at a high and dangerous rate of speed; and that the said William B. West was by said collision and by the gross carelessness and negligence on the part of the defendant

and without any fault or neglect upon his part was then and there caused to sustain and receive personal injuries which resulted in his immediate death. Plaintiff brings suit in the sum of \$50,000.00 for said killing.

"The defendant has filed an answer which after denying each and every material allegation in plaintiff's petition, avers that if the said William B. West was injured and killed at the time, place and in the manner alleged his death was not due to any negligence on the part of the defendant, or any of its servants, agents or employés, but was due solely to the negligence on the part of the said William B. West. Defendant further alleges in its answer that the defendant before entering into the service of this company had executed two certain contracts to the American Express Company by which claims for damages for injuries were waived and released and in which contract he agreed to release any railroad on which he might be working at the time of any injury, and that the plaintiff is now barred from maintaining this action.

XV.

That the Court erred in instructing the jury in accordance with its instruction-, numbered 2, which was given to the jury, 306 to the giving of which instruction the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 2, being as follows:

"You are further instructed that the jury are the sole judges of the weight of the testimony and the credibility of the witnesses, but the law of the case is that which is given to you by the Court in these instructions and you are to be governed by no other law. In determining the weight of the testimony and the credibility of the witnesses you have the right to look to each witness as he conducted himself while upon the witness stand, to his fairness, or lack of fairness, to his intelligence or his incapacity as the same appeared to you, to his interest in the case, if any, and you have the right to look to each and every surrounding circumstance that appears in the testimony. If there is a conflict between the different parts of the testimony of any witness it is your duty to reconcile the same, if this can be done, upon the theory that each witness has spoken the truth; but if this can not be done then you may disregard any part of the testimony of any witness, or all of his testimony, as you may see fit under the surrounding facts and evidence in the case. If you believe from the evidence that any witness has wilfully testified falsely to any fact material to the issue in this case, then you are at liberty to disregard any part or the whole of the testimony of such witness."

XVI.

That the Court erred in instructing the jury in accordance with its instruction, numbered 3, which was given to the jury, 307 the giving of which instruction the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 3, being as follows:

"The burden is upon the plaintiff to sustain her contention by a preponderance of the testimony. By this is meant by the great weight of the testimony, and not necessarily the number of witnesses testifying upon the one side or the other."

XVII.

That the court erred in instructing the jury in accordance with its instruction, numbered 4½, which was given to the jury, to the giving of which instruction the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 4 being as follows:

"You are instructed that it is the duty of a railway company to so conduct, maintain and run its trains used in its business in such a manner as to prevent injury to persons riding on said trains."

XVIII.

That the Court erred in instructing the jury in accordance with its instruction, numbered 4½, which was given to the jury, to the giving of which instruction the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 4½ being as follows:

"By 'ordinary care' as that term is used in these instructions, is meant that degree of care which a person of reasonable prudence and caution would likely use and exercise under the same or similar circumstances and conditions, and a failure to use such care
308 is negligence on the part of the person or corporation guilty of such failure. That is to say; Negligence is the failure to do or perform some act or the doing of some act which, from the nature of the act and under the circumstances, may result in injury or damage to the person or property of others, and which a person of reasonable prudence would or would not do, as the case may be, under the same or similar circumstances, and the rule here stated, applies equally to persons and corporations, the latter, that is, corporations, being chargeable with the negligence, if any committed by their officers, agents and employes in the discharge of their duty as such."

XIX.

That the court erred in instructing the jury in accordance with its instruction, numbered 5, which was given to the jury, to the giving of which instruction the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 5 being as follows:

"Now bearing in mind these instructions and applying them carefully to the evidence before you, if you believe and find from a preponderance of the testimony that on or about the 15th day of May, 1908, in the County of Muskogee, William B. Belt was personally injured by being in a wreck caused by a collision between the "Katy Flyer" and one of defendant's freight trains on its line of

309 railroad south of the Arkansas River bridge, and you further find that such injury was the direct or proximate result of the negligence of the defendant, its agents, officers, or employés to properly conduct and run its trains on said railroad track; that is, if you so find and believe that the injury sustained by William B. West was the direct or proximate result of the failure of defendant, its officers, agents or employés to exercise that degree of diligence and care to prevent injury to others as a person of ordinary caution and prudence would likely have used under the same or similar circumstances, and you further find that such injury caused the death of the said William B. West, then it will be your duty to return a verdict in favor of the plaintiff herein for such sum as, in your judgment, the evidence shows her to be entitled to under other instructions given you in this case."

XX.

That the court erred in instructing the jury in accordance with its instruction, numbered 6, which was given to the jury, to the giving of which instruction the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 6, being as follows:

"If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and, determining this, you may consider the probable earnings of the deceased, his age, experience, 310 habits, health and bodily qualifications, during what probably would have been his life time if he had not been killed, so far as these matters have been shown by the evidence, but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition."

XXI.

That the court erred in instructing the jury in accordance with its instruction, numbered 7, which was given to the jury, to the giving of which instruction the defendant then and there objected and excepted, and still objects and excepts, said instruction No. 7 being as follows:

"Nine of the jury concurring is sufficient to return a verdict for plaintiff or defendant, and if the verdict is rendered by nine or more, but by less than the whole number of jurors, then the jurors who concur in the verdict must sign their names thereto. If the verdict is concurred in by the entire jury, then you will select some one of your number foreman, and have him sign the verdict as such foreman and return it into court."

XXII.

That the Court erred in the admission of evidence offered by the plaintiff, to which action of the court the defendant objected and excepted at the time, and still objects and excepts.

XXIII.

That the court erred in the exclusion of evidence offered by the defendant, to which action of the court the defendant excepted at the time and still excepts.

311 The defendant states each and all of the errors of the court, as herein alleged, were prejudicial to its rights and prevented it from having a fair trial.

Wherefore, defendant prays, that the verdict herein rendered be vacated and that a new trial be granted it, and that it have all further and proper relief to which it may be entitled.

CLIFFORD L. JACKSON,

W. R. ALLEN,

Attorneys for Defendant.

Endorsed on back as follows: In the District Court, Third Judicial District, Muskogee County, State of Oklahoma, Ivolue B. West, Plaintiff, vs. Missouri, Kansas & Texas Railway Company, Defendant. Motion for new Trial. State of Oklahoma, County of Muskogee. Filed Apr'l 1910, W. P. Miller, District Clerk.

312 Thereafter and on towit the 9th day of April, 1910, and during the said February, 1910, term of said Court, said motion of said defendant for a new trial came on for hearing and after argument of counsel thereon, and upon the day last aforesaid, to wit: the 9th day of April, 1910, the Court being fully advised in the premises, overruled said motion for a new trial and refused to grant to said defendant a new trial, to which action of the court in overruling said motion for a new trial and for refusing to grant the defendant a new trial, said defendant then and there duly excepted at the time.

That the Court thereupon and on the 9th day of April, 1910, during the said February, 1910, term of said court, proceeded to and did make and render judgment against the defendant and in favor of the plaintiff for the sum of \$15,000.00, and the costs of this action taxed at \$—— to which action of the court in making and rendering said judgment and each and every part thereof, the said defendant then and there duly excepted at the time, and the court on the day last aforesaid, immediately after overruling the motion for a new trial and during the February, 1910, term of said Court, and for good cause shown, granted the said defendant ninety days extension of time within which to make and serve the case made for the Supreme Court, the plaintiff to have twenty days thereafter to suggest amendments, the case to be settled upon five days' notice by either side, and stayed execution pending the filing of the case-made in the Supreme Court conditioned upon the defendant giving an undertaking by law provided. Said judgment so rendered as hereinbefore stated is in words and figures as follows, to-wit:

313 In the District Court, Third Judicial District, Muskogee County, State of Oklahoma.

No. 239.

IVOLUE B. WEST, Plaintiff,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Journal Entry to go in Proceedings of Court, April 9th, 1910.

Now on this the 9th day of April, 1910, the same being a regular judicial day of the February, 1910, term of the District Court for the Third Judicial District, Muskogee County, State of Oklahoma, comes on for hearing before the Court the motion for a new trial heretofore filed by the defendant herein and the court having duly considered the same, and after argument of counsel, and being fully advised, overrules said motion for a new trial, to which action of the court in overruling said motion for a new trial the defendant at the same time excepts.

Wherefore, it is considered, ordered, adjudged and decreed by the court that the plaintiff shall have and recover of and from the defendant the sum of Fifteen Thousand (\$15,000) Dollars, with interest thereon at the rate of seven (7) per cent. per annum, and the costs of this suit, to which judgment and entry thereof the defendant at the time objects and excepts.

Thereupon, and upon the same day, to-wit: the 9th day of April, 1910, and for good cause shown, the defendant is allowed ninety (90) days extension of time within which to make and serve a case made for the Supreme Court. The plaintiff is given twenty (20) days thereafter within which to suggest amendments, the case to be settled upon five days' notice by either side. The defendant
314 is given ten days to file an appeal bond and execution is stayed pending the time allowed herein for filing said bond; and upon filing said bond execution herein is further stayed for a period of one hundred and thirty (130) days.

JOHN H. KING, *Judge.*

O. K.

S. GRANT HARRIS,

BENJ. MARTIN,

Attorneys for Plaintiff.

Endorsed on back as follows: In the District Court, Third Judicial District. Muskogee County, State of Oklahoma. Ivolue B. West, Plaintiff vs. Missouri, Kansas & Texas, Railway Company, Defendant. Journal Entry to go in proceedings of Court. April 9th, 1910. State of Oklahoma. County of Muskogee. Filed May 17, 1910. W. P. Miller, District Judge.

315 The above and foregoing sets out fully and correctly all pleadings, filed in said cause, all motions filed or made, and all rulings and orders made thereon; all exceptions taken by the defendant to such rulings and orders; exceptions by plaintiff; all the evidence offered, introduced, or received upon the trial; all the instructions given to the jury, as well as those asked by the defendant and refused by the court, the verdict of the jury and the judgment of the court thereon, and the exceptions of the defendant thereto; and the same is a true and correct statement and complete transcript of all the pleadings, motions, evidence, findings, judgments and proceedings in said cause.

316 In the District Court, Third Judicial District, Muskogee County, State of Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,
vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

To the above named plaintiff and her attorneys, S. Grant Harris and Benjamin Martin, Jr.:

The above and foregoing case made is hereby tendered to and served upon you and each of you as a true and correct case-made in the above entitled cause, and as a true and correct statement and complete transcript of all pleadings, motions, orders, evidence, findings, judgments and proceedings in the above entitled cause, this 7th day of July, 1910.

CLIFFORD L. JACKSON,
W. R. ALLEN,
Attorneys for Defendant.

We hereby accept and acknowledge due, legal and timely service of the above and foregoing case made on us this 7th day of July 1910.

S. GRANT HARRIS,
BENJ. MARTIN, Jr.,
Attorneys for Plaintiff.

317 In the District Court, Third Judicial District, Muskogee County, State of Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Waiver.

This is to certify that we, the undersigned, S. Grant Harris and Benjamin Martin, Jr., attorneys for the plaintiff, Ivolue B. West, have examined the foregoing case made and find the same true and correct in all particulars, and have no amendments to suggest, and waive the time allowed by the court in which to suggest amendments to same, and consent that the case-made as heretofore set out may be signed, settled, certified and allowed by the court, as in all respects full, true and correct.

We hereby further expressly waive the issuing and service of summons in error out of the Supreme Court and hereby enter the appearance of the plaintiff, Ivolue B. West, as defendant in error, upon the appeal of the above entitled cause to the Supreme Court of Oklahoma.

Dated this 19th day of July, 1910.

S. GRANT HARRIS,

BENJ. MARTIN, JR.,

Attorneys for Plaintiff.

Filed August 13, 1910, W. H. L. Campbell, Clerk.

318 In the District Court, Third Judicial District, Muskogee County, State of Oklahoma.

No. 329.

IVOLUE B. WEST, Plaintiff,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

We, the undersigned, attorneys of record for the above named plaintiff, do hereby waive notice to us of the time and place of the presentation of the above and foregoing case-made to the Judge of said District Court, before whom said cause was tried, for settlement, and signing, and hereby agree that said case may be presented to said judge for settlement and signing, and be settled, signed and allowed by said judge at any time when it may suit his convenience to do so.

S. GRANT HARRIS,

BENJ. MARTIN, JR.,

Attorneys for Plaintiff.

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319 In the District Court, Third Judicial District, Muskogee County, State of Oklahoma.

No. 329.

INVOLUE B. WEST, Plaintiff,

VS.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant.

Certificate.

I, the undersigned Judge of the District Court, Third Judicial District, Muskogee County, State of Oklahoma, before whom said cause was tried, hereby certify that the foregoing was presented to me at the court-house in the city of Muskogee, in the County of Muskogee, in the State of Oklahoma, as the case made herein, as required by law, by the parties to said cause, and it appearing to me that the said case-made has been duly made and served upon the plaintiff within the time fixed by the orders of this court, and the manner and form provided by law, the said defendant appearing by its attorneys and the said plaintiff not appearing either in person or by her attorneys, and the said case-made having been examined by me, is true and correct and contains a true and correct statement and complete transcript of all pleadings, motions, orders, evidence, findings, judgments, and proceedings in said cause, and the plaintiff in said cause by her attorneys, S. Grant Harris and Benjamin Martin, Jr., having certified in writing that the foregoing case-made is a true and correct case made in all particulars, and that they have no amendments to suggest and waive the time allowed by the court

within which to suggest amendments and waive notice of
320 the time and place of presentation of the said case made to the Judge of the said Court who tried the cause, for settlement and signing, and consent that the said case-made as hereinbefore set out may be signed, settled, certified, and allowed by the court as in all respects full, true and correct, I hereby allow, certify, sign and settle the case as a true and correct case made in said cause and direct that it be attested and filed by the Clerk of said Court.

Witness my hand at Muskogee, Muskogee County, State of Oklahoma, this 6th day of August, 1910.

[SEAL.]

JOHN H. KING,

Judge of the District Court, Third Judicial District, Muskogee County, State of Oklahoma.

Attest:

W. P. MILLER,

Clerk of the District Court, Third Judicial District, Muskogee County, State of Oklahoma,

By ROSS HAUCK, Deputy.

321 Case made endorsed on back as follows: No. 1928. Filed August 13, 1910, W. H. L. Campbell, Clerk. State of Oklahoma, County of Muskogee. Filed Aug. 10, 1910, W. P. Miller, Clerk.

322 In the Supreme Court of the State of Oklahoma

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
IVOLUE B. WEST, Defendant in Error.

Stipulation for Additional Time to File Briefs.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, through their respective attorneys, that the plaintiff in error shall have ninety (90) days in addition to the time allowed by the rules of court within which to file its brief in the above entitled case.

CLIFFORD L. JACKSON,
W. R. ALLEN,
Attorneys for Plaintiff in Error.
S. GRANT HARRIS &
BENJ. MARTIN,
Attorneys for Defendant in Error

Endorsed: No. 1928. In the Supreme Court of the State of Oklahoma. Missouri, Kansas & Texas Railway Company, Plaintiff in Error, vs. Ivolue B. West, Defendant in Error. Stipulation for additional time to file briefs. Filed Sep. 22, 1910. W. H. L. Campbell, Clerk.

323 Supreme Court, September Term, 1910, September 27th,
1910, Ninth Judicial Day.

And thereafter to-wit, on the 27th day of September, 1910, in the Supreme Court of Oklahoma, the following proceedings were had in said cause.

No. 1928.

M., K. & T. Ry. Co., Plaintiff in Error,
vs.
IVOLUE B. WEST, Defendant in Error.

And now on this day it is ordered by the court that the stipulation herein that plaintiff in error have 90 days' additional time to file briefs, be, and the same is hereby allowed.

324 In the Supreme Court of the State of Oklahoma.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
IVOLUE B. WEST, Defendant in Error.

Motion of Plaintiff in Error for Additional Time to File Briefs.

Come now Clifford L. Jackson and W. R. Allen, Attorneys for Plaintiff in error in the above entitled case, and respectfully show to this Honorable Court that owing to an unusual press of business, which necessitates immediate attention, that it has been practically impossible to prepare and file brief in the above entitled case within the time provided by the rules of court, and the order heretofore made by this court based upon the stipulation filed therein,

Wherefore, plaintiff in error, through its attorneys, respectfully prays that it be granted ninety (90) days in addition to the time heretofore allowed by this Honorable Court within which to file brief.

CLIFFORD L. JACKSON,
W. R. ALLEN,
Attorneys for Plaintiff in Error.

STATE OF OKLAHOMA,
County of Muskogee, ss:

W. R. Allen, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff in error in the above entitled case; that he has read and is familiar with the foregoing motion, and that the facts contained therein are true.

W. R. ALLEN.

(Filed Dec. 21, 1910. W. H. L. Campbell, Clerk.)

Subscribed and sworn to before me this 20 day of Dec., 1910.

[SEAL.]

WILLIAM P. Z. GERMAN
Notary Public.

My Com. Exp. June 26, 1912.

325 To Messrs. S. Grant Harris and Benjamin Martin, attorneys
for Defendant in Error:

You and each of you are hereby notified that the above and foregoing motion will be filed in the Supreme Court on or before the 21st day of December, 1910.

CLIFFORD L. JACKSON,
W. R. ALLEN,
Attorneys for Plaintiff in Error.

Service of copy of the above and foregoing motion for additional time within which to file brief is hereby accepted this 20th day of December, 1910.

S. GRANT HARRIS,
By B. M.,
BENJ. MARTIN,
Attorneys for Defendant in Error.

(Filed Dec. 21, 1910. W. H. L. Campbell, Clerk.)

Endorsed: Ct. No. 1928. In the Supreme Court of the State of Oklahoma. Missouri, Kansas & Texas Railway Company, Plaintiff in Error, vs. Ivolue B. West, Defendant in Error. Motion of Plaintiff in Error for Additional Time to File Brief. Filed Dec. 21, 1910. W. H. L. Campbell, Clerk.

326 Supreme Court, November Term, 1910, January 3rd, 1911, Eleventh Judicial Day.

And thereafter to-wit, on the 3rd day of January, 1911, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

M., K. & T. Ry. Co., Plaintiff in Error,
vs.
I. B. WEST, Defendant in Error.

And now on this day it is ordered by the court that the motion of plaintiff in error herein, for 90 days' additional time to file brief, be, and the same is hereby allowed.

327 In the Supreme Court of the State of Oklahoma.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
IVOLUE B. WEST, Defendant in Error.

Motion of Plaintiff in Error for Additional Time to File Briefs.

Come now Clifford L. Jackson and W. R. Allen, Attorneys for plaintiff in error in the above entitled case, and respectfully show to this Honorable Court that owing to an unusual press of business which necessitates immediate attention, that it has been practically impossible to prepare and file brief in the above entitled case within the time provided by the rules of court, and the order heretofore made by this court based upon the stipulation filed therein.

Wherefore, plaintiff in error, through its attorneys respectfully prays that it be granted sixty (60) days in addition to the time heretofore allowed by this Honorable Court within which to file brief.

CLIFFORD L. JACKSON,
W. R. ALLEN,
Attorneys for Plaintiff in Error.

STATE OF OKLAHOMA,
County of Muskogee, ss:

W. R. Allen, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff in error in the above entitled case; that he has read and is familiar with the foregoing motion, and that the facts contained therein are true.

W. R. ALLEN.

Subscribed and sworn to before me this 18 day of March, 1911.
[SEAL.] CARL H. COOPER,

Notary Public.

My Commission Expires Jan. 17th, 1915.

328 To Messrs. S. Grant Harris and Benjamin Martin, Attorneys for Defendant in Error:

You and each of you are hereby notified that the above and foregoing motion will be filed in the Supreme Court on or before the 20th day of March, 1911.

CLIFFORD L. JACKSON,
W. R. ALLEN,
Attorneys for Plaintiff in Error.

(Filed Mar. 20, 1911, W. H. L. Campbell, Clerk.)

Service by copy of the above and foregoing motion for additional time within which to file brief is hereby accepted this — day of March, 1911.

Attorneys for Defendant in Error.

329 STATE OF OKLAHOMA,
County of Muskogee, ss:

W. R. Allen being first duly sworn, deposes and says that he served the above and foregoing motion for additional time to file brief in the above entitled and foregoing case, upon Mr. Benjamin Martin, one of the attorneys for the defendant in error, by delivering to him, a true copy of the said motion, at his office at Muskogee, Oklahoma, at two o'clock p. m. on the 18th day of March, 1911.

W. R. ALLEN.

Subscribed and sworn to before me this 18th day of March, 1911.
[SEAL.] CARL H. COOPER,

Notary Public.

My Commission expires Jan. 17th, 1915.

(Filed Mar. 20, 1911. W. H. L. Campbell, Clerk.)

Endorsed: No. 1928. In the Supreme Court of the State of Oklahoma. Missouri, Kansas & Texas Railway Company, Plaintiff in Error, vs. Ivolue B. West, Defendant in Error. Motion of Plaintiff in Error for Additional time to file Brief. Filed Mar. 20, 1911. W. H. L. Campbell, Clerk.

330 Supreme Court, March Term, 1911, April 8th, 1911, Third Judicial Day.

And thereafter on the 8th day of April, 1911, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

M., K. & T. Ry. Co., Plaintiff in Error,
vs.
IVOLUE B. WEST, Defendant in Error.

And now on this day it is ordered by the court that the motion of plaintiff in error herein for 60 days' additional time to file brief, be, and the same is hereby allowed.

331 In the Supreme Court of the State of Oklahoma.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
IVOLUE B. WEST, Defendant in Error.

Stipulation for Additional Time to File Briefs.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, through their respective attorneys, that the Defendant in Error shall have ninety (90) days in addition to the time allowed by the rules of said Court within which to serve and file her answer briefs in the above entitled case, and that the plaintiff in error shall have 30 days after filing of answer brief to file reply brief.

S. GRANT HARRIS &
BENJ. MARTIN,
Attorneys for Defendant in Error.
CLIFFORD L. JACKSON,
W. R. ALLEN,
Attorneys for Plaintiff in Error.

Endorsed: No. 1928. In the Supreme Court of the State of Oklahoma.—Missouri, Kansas & Texas Railway Company, Plaintiff in

Error, vs. Ivolue B. West, Defendant in Error.—Stipulation for Additional Time to File Briefs.—Filed Jun- 15, 1911. W. H. L. Campbell, Clerk.—S. Grant Harris, St. Paul, Minn. Benjamin Martin, Jr., Muskogee, Okla., Attorneys for Defendant in Error.

332 Supreme Court, May Term, 1911, June 27th, 1911, Fourth Judicial Day.

And thereafter to-wit, on the 27th day of June, 1911, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

M. K. & T. Ry. Co., Plaintiff in Error,

VS.

IVOLUE B. WEST, Defendant in Error.

And now on this day it is ordered by the court that the stipulation herein that defendant in error have 90 days additional time to file brief, and plaintiff in error 30 days thereafter in which to reply, be, and the same is hereby allowed.

333 In the Supreme Court of Oklahoma.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

VS.

IVOLUE B. WEST, Defendant in Error.

Motion to Strike From Cases Assigned for Submission.

Comes now the plaintiff in error, Missouri, Kansas & Texas Railway Company, and moves this Honorable Court that the above entitled case, which is assigned for submission on May 14, 1912, be stricken from the cases so assigned for submission, and set down for oral argument at this term of court, for the reason that notice to the Clerk of this Court that counsel for plaintiff in error desired to orally argue this case, was duly filed with said Clerk.

CLIFFORD L. JACKSON,

W. R. ALLEN,

M. D. GREEN,

Attorneys for Plaintiff in Error.

To Messrs. S. Grant Harris and Benjamin Martin, Attorneys for Defendant in Error:

You, and each of you, are hereby notified that the above and foregoing motion will be presented to the Court at the hour of ten

o'clock A. M. on Tuesday, May 14th, 1912, or as soon thereafter as counsel can be heard.

CLIFFORD L. JACKSON,
W. R. ALLEN,
M. D. GREEN,
Attorneys for Plaintiff in Error.

Acceptance of service of the above and foregoing motion is hereby acknowledged, this the — day of May, 1912.

Attorneys for Defendant in Error.

334 STATE OF OKLAHOMA,
County of Muskogee, ss:

M. D. Green, being duly sworn, deposes and says: that he is one of the attorneys of record for the plaintiff in error in the above entitled case; that he served the within and foregoing motion and notice upon Benjamin Martin, an attorney of record for the defendant in error in the above entitled case, on the 9th day of May, 1912, by delivering a true copy of said motion and notice to said Benjamin Martin.

M. D. GREEN.

Subscribed and sworn to, before me, this 9th day of May, 1912.
[SEAL.] CARL H. COOPER,
Notary Public.

My commission expires: Jan 17th, 1915.

Endorsed: No. 1928.—In the Supreme Court of the State of Oklahoma. Missouri, Kansas & Texas Railway Company, Appellant and Plaintiff in Error, vs. Ivolue B. West, Appellee and Defendant in Error.—Filed May 11 1912. W. H. L. Campbell, Clerk.—Motion to strike from cases assigned for submission and proof of service.

335 Supreme Court, May Term, 1912, May 14, 1912, First Judicial Day.

And thereafter to-wit, on the 14th day of May, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

M. K. & T. Ry. Co., Plaintiff in Error,
vs.
IVOLUE B. WEST, Defendant in Error.

And now on this day it is ordered by the court that the above entitled cause be, and the same is hereby continued and set at the heel of the docket of this term.

336 Supreme Court, May Term, 1912, May 20, 1912, Sixth Judicial Day.

And thereafter to-wit, on the 20th day of May, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

M., K. & T. Ry. Co., Plaintiff in error,
vs.
IVOLUE B. WEST, Defendant in error.

And now on this day the above cause is argued orally and the cause submitted, and defendant in error allowed ten days to file type-written supplemental briefs.

337 Supreme Court, May Term, 1912, June 20th, 1912.

Thirteenth Judicial Day.

And thereafter to-wit, on the 20th day of June, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

M., K. & T. Ry. Co., Plaintiff in error,
vs.
IVOLUE B. WEST, Defendant in error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the lower court in the above entitled cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the lower court in the above entitled cause, be, and the same is hereby affirmed. Opinion by Williams, J. All the Justices concur.

(Filed Jun- 20, 1912.)

In the Supreme Court of the State of Oklahoma.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
IVOLUE B. WEST, Defendant in Error.

Syllabus.

1. Defendant in error's intestate being an employé of the express company, and not of the plaintiff in error (the railway company), but a passenger on its train at the time of being injured, the Federal Employers' Liability Act of April 22, 1908 (35 U. S. Stat., p. 65; U. S. Comp. Stat. 1901, p. 1322), entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," does not apply.

(a) Sections 5945 and 5946, Comp. Laws 1909, apply, as modified by section 7, article 23, Constitution of this State.

2. In view of the Kansas statutes making a railroad company liable for all damages done to persons or property in consequence of any neglect on its part (Gen. Stat. 1901, sec. 5857), and for all damages done to any of its employees in consequence of any negligence of its agents or by any mismanagement of its engineers or other employees (Gen. Stat. 1901, sec. 5858), although an express company contracts with the railway company by means of whose trains it carries on its business that it assumes all risk of injury to its employees and undertakes to save the railway company harmless from any claims with respect thereto, and contracts with one of its employees that neither it nor the railway company shall be liable to him for any injury occurring to him while travelling on any of such trains in the course of such employment, such employee may still maintain an action against the railway company for injuries received while so travelling in consequence of the negligence of its agents. (Following *Sewell v. A. T. & S. F., Ry. Co.*, 78 Kan. 17.)

(a) Such contract is also void as being against the public policy of this State as expressed by its Constitution and laws.

3. In an action for injury to a passenger, through a head-end collision of a passenger train and locomotive with a locomotive and freight train, both the passenger and freight train being owned and operated by the plaintiff in error, where the undisputed testimony shows that the accident was caused by the negligence of the plaintiff in error, error in instructing as to the degree of care on the part of the plaintiff in error required is not prejudicial error.

4. The court instructed the jury as follows:

"If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the

339 same with reference to the pecuniary loss sustained by the widow and children of the deceased, and, determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what would probably have been his life time, if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition."

Held, without prejudicial error.

(a) Neither is recovery for loss of society of deceased or mental anguish, permissible, nor was any permitted by said instruction.

(b) In determining the pecuniary loss on account of the death of the intestate, the loss of the mental, moral and physical training or advice of the parent, in a suit by or for his child or children, may be included for the merely sentimental loss. damages recoverable.

(c) Recovery may be had only for the loss of such advice or training as would have had pecuniary value, in estimating which, the age and situation of the parties is to be considered, and nothing may be included for the merely sentimental loss.

(d) There must be proof that the intestate was fitted by nature or education, or by disposition, to furnish to his children instruction, or moral, physical or intellectual training or advice, in order for the jury to consider the loss of instruction and moral training or advice as an element of pecuniary damages.

5. When the brief of the plaintiff in error, in any civil cause, fails to preserve, by specification of error any point complained of in the lower court, other than that as to jurisdiction, such question is thereby waived in this court.

Error from the District Court of Muskogee County.

John H. King, Trial Judge.

Clifford L. Jackson, W. R. Allen, (M. D. Green on brief, For Plaintiff in Error.

Chas. H. Taylor, S. Grant Harris, St. Paul, Minn. (Benj. Martin and Jno. D. O'Brien on brief) For Defendant in Error.

Affirmed.

340 Opinion of the Court by WILLIAMS, J.:

This proceeding in error seeks to review the judgment of the district court in an action commenced on July 8, 1909, by Ivolue B. West, the defendant in error, as plaintiff, against the Missouri, Kansas and Texas Railway Company, the plaintiff in error, as defendant, to recover the sum of \$50,000 as damages on account of the death of her husband, William B. West, an express messenger and baggageman on one of the trains of the defendant, said death occurring in a collision of passenger train No. 5, commonly known as the "Katy Flyer," upon which the intestate was riding, with

freight train No. 412, near Muskogee, Oklahoma, on May 15, 1908.

The petition is as follows:

"* * * 3. That William B. West, deceased, hereinafter named, left him surviving, as his only heirs at law, the plaintiff herein, his widow, who is thirty-six (36) years of age, and three minor children, whose names and ages are as follows, viz.: Norma H. West, aged sixteen; Glenford B. West, aged seven years, and Wilmetta M. West, aged two years, and also a posthumous child, born June 29, 1908.

4. That this action is brought by the plaintiff as widow of said William B. West, and for the benefit of herself, as such widow, and of said minor children of herself and of said William B. West, deceased. * * *

5. That at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company, as express messenger upon the express cars operated by said defendant company, over its said line of railroad operated between said city of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas.

That in addition to his duties and employment as express messenger, as aforesaid, said William B. West also engaged in handling passenger baggage upon the express cars of said defendant company.

6. That on May 15, 1908, at about twelve o'clock noon, of said day, said William B. West, in the course of his employment as hereinbefore set out, was riding in one of the express cars of said defendant company, attached to one of the regular trains of said defendant company, being then and there run and operated by said defendant company, over said railroad line in a southerly direction through the State of Oklahoma, which train was one of the regular passenger trains of said defendant, known as "Number Five," and also known as the "Katy Flyer," and that when said train reached a point in said State of Oklahoma, a short distance southerly of the Arkansas river, between the said stations of Verdard and Muskogee, in said State of Oklahoma, said train upon which said William B. West was so riding in the performance of his duties as aforesaid,

341 was by said defendant railroad corporation, through gross carelessness and negligence, upon its part, and while said train was running at a high and dangerous rate of speed, caused and allowed to collide in what is known as a head-end collision with a locomotive and freight train, also owned, maintained and operated by said defendant company, and which freight train was also then and there, through the gross carelessness and negligence of said defendant company, being run and operated, by said defendant company upon the same track, in a northerly direction, at a high and dangerous rate of speed, and that said William B. West was, by said collision and by said gross carelessness and negligence on the part of said defendant railroad company, in causing and allowing said trains to be so run and operated upon the same track and to collide as aforesaid, and without any fault or neglect, whatsoever, upon the part of said William B. West, then and there

caused to sustain and receive such personal bodily injuries as resulted in his immediate death.

9. That the expectancy of life of said William B. West at the time of his death, according to the Carlisle tables of mortality, was twenty-nine and sixty-four one-hundredths years (29 64-100), and that at the time of his death, as aforesaid, said William B. West was but thirty-eight years of age and in good health of body and mind, and of strong physique and was well able to do great mental and manual labor, and to earn at least the sum of eighty-three and thirty-three one-hundredths dollars (\$83.33/100) per month, at his business and employment as express messenger and baggageman as aforesaid, and that at said time was, in fact, actually earning and receiving from his said employment the sum of eighty-three and thirty-three one-hundredths dollars (\$83.33-100) per month, and that he would (except for his death so resulting from the neglect of said defendant) have continued to earn and receive a much larger sum per month, for at least the period of twenty-nine years (29) thereafter, and in the aggregate, at least the sum of thirty thousand dollars (\$30,000), and that plaintiff herein, and her said children would have received for their own benefit, out of said moneys that said William B. West would have earned (except for his death as aforesaid) an amount in excess of twenty-five thousand (\$25,000) and that plaintiff and her said children have been damaged at the hands of defendant in the loss of the care, aid, advice and society of said William B. West as husband of plaintiff and father of said children in the further sum of at least twenty-five thousand (\$25,000) dollars."

The defendant demurred to plaintiff's petition, on the grounds, (1) no legal capacity to sue for the minor children named in paragraph three of said petition; (2) defect of parties plaintiff, in that the suit is brought in the name of Ivolue B. West as plaintiff, while in paragraph four of said petition it is stated that the suit was brought by the plaintiff for the benefit of herself and the minor children named in paragraph three of said petition; (3) facts sufficient to constitute a cause of action on behalf of the plaintiff not stated in the petition.

342 The demurrer having been overruled, and exceptions saved, the defendant answered, (1) denying any negligence on its part, but averring contributory negligence on the part of the intestate; (2) that the train described in the petition as "Number Five," or the "Katy Flyer," was an interstate train, engaged in the movement of interstate commerce; (3) that prior to the time of the alleged injury in question, the said William B. West had made application to the American Express Company in writing for employment by it as driver of one of its wagons at Parsons, Kansas, and was so engaged pursuant to the terms of a written contract, said contract being dated January 9, 1893. Said contract is in part as follows:

"Whereas, I, the undersigned, have entered, or am about to enter, the employ of the American Express Company, and in the course of such employment may be required to render services in the care,

carriage or handling of merchandise and property in the course of transportation by cars, vessels and vehicles belonging to the different railroad, stage and steamboat lines upon which the company relies for its means of forwarding property delivered to it to be forwarded;

And whereas, such Express Company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employees:

Now therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel or vehicle, or of any employee of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation, or of any employé of any person or corporation, or otherwise.

And I hereby bind myself, my heirs, executors and administrators, with the payment to such Express Company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

343 I do further agree that in case I shall at any time suffer any injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning and operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

I do hereby ratify all agreements heretofore made by said Express Company with any corporation or persons operating any railroad, stage or steamboat line in which such Express Company has agreed in substance that its employés shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements insofar as the provisions thereof relative to injuries sustained by employés of the Company are concerned, as fully as if I were a party thereto.

And I do hereby authorize and empower said Express Company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporations or persons operating any railroad, stage or steamboat line, *for my trans-*

portation as a messenger or employé free of charge, (*italics ours*), upon the condition and consideration, that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employé of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and to all persons upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons."

That the intestate, prior to the time of the alleged injury in question, made application to the American Express Company in writing for employment by it as an express messenger, and that pursuant to said application he was, prior to and at the time of the alleged injury in question, employed by the American Express Company, under a contract in writing between him and said company, which contract was dated October 15, 1896, a copy of which is attached to said answer as a part thereof, as "Exhibit B." This contract also includes as a part of its provisions the contract hereinbefore designated and referred to as "Exhibit A."

It is pleaded that by the terms of said contract identified as 344 "Exhibit B" it was provided that in consideration of the premises and of the employment of deceased, he did assume all risk of accident and injury which he should meet with or sustain in the course of his employment, whether occasioned or resulting by or from the gross or other negligence of said corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employé of any such corporation or person, or otherwise, and whether resulting in his death or otherwise. Said contract referred to as "Exhibit B" is in part as follows:

"Whereas I, the undersigned, have entered, or am about to enter, the employment of the American Express Company, and in the course of such employment may be required to render services in the care, carriage or handling of merchandise and property in the course of transportation by cars, vessels and vehicles belonging to the different railroad, stage and steamboat lines upon which the company relies for its means of forwarding property delivered to it to be forwarded;

And whereas, such Express Company, under its contracts with many of the corporations and persons owning or operating such railroad, stage or steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employees;

Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negli-

gence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employé of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation, or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation, or of any employé of any person or corporation, or otherwise.

And I hereby bind myself, my heirs, executors and administrators with the payment to such express company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all
345 claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

I do hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage or steamboat line in which such express company has agreed in substance that its employés shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements in so far as the provisions thereof relative to injuries sustained by employés of the company are concerned, as fully as if I were a party thereto.

And I do hereby authorize and empower said express company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporation or persons operating any railroad, stage or steamboat line, for my transportation as a messenger or employé free of charge, upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employé of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and of all persons upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said Company, or any of its members, officers, agents, or employes, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith."

It is further recited in the answer:

"Defendant admits that at and prior to the death of the said William B. West, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of railroad between the city of Parsons, Kansas, through the State of Oklahoma, to points beyond in the state of Texas, and admits that the deceased, William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express car of the said defendant railway company, and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by the said American Express Company, and that such handling
346 of such baggage by said West was for and in behalf of and under the direction of said railway company."

Plaintiff replied that said contracts, identified as exhibits A and B were void; that "by virtue of the laws and statutes duly existing in the said State of Kansas, all railroad companies operating within said State of Kansas were liable for all damages done to persons or property, if done in consequence of any negligence upon the part of said railroad companies, and by the laws and statutes of said state all contracts by which it was attempted to release any railroad company from such damages was void as being in violation of said laws and statutes and of the public policy of the State of Kansas, and that said laws and statutes ever since have and still do exist and are in force in said State of Kansas, and that said contract was wholly without consideration;

"That by reason of the existence of said laws and statutes and the want of consideration, aforesaid, the said pretended contract or the evidence thereof purporting to exist in Exhibits 'A' and 'B' attached to the answer of the defendant were and are wholly void and of no effect."

Defendant demurred to said reply, which was overruled and exceptions saved.

Defendant then filed a rejoinder to plaintiff's reply. On the issues

this made the cause was tried before a jury and a verdict returned in favor of the plaintiff in the sum of \$15,000.

1. The plaintiff in error insists that the liability of the plaintiff in this case is controlled entirely by the Act of Congress commonly known as the "Employers' Liability Act," under which the only person entitled to sue is the personal representative of the deceased.

The act of April 22, 1908 (35 U. S. Stat., p. 65; U. S. Comp. Stat. 1901, p. 1322), entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," provides:

SEC. 1. "That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any persons suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Section 5 of said act also provides:

"That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void; Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Section 7 of said act provides further:

"That the term 'common carrier' as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier."

It is insisted that the intestate was not in the employ of the plaintiff in error, but in that of the American Express Company. Under the issues as framed, said intestate was an employee of the express company and not of the railroad company. This is not an action by the defendant in error against the American Express Company, the intestate's employer, in which event, if the express company comes within the term of a common carrier by railroad, the act of Congress of April 22, 1902, would apply.

348 Plaintiff in error in its reply brief insists, that under the pleadings it avers that defendant in error's intestate was an employee of the railway company. The defendant in error in her petition alleges as follows:

"That in addition to his duties and employment as express messenger, as aforesaid, the said William B. West also engaged in handling passenger baggage upon the express cars of the defendant company."

In the third amended answer of the plaintiff in error, after admitting the truth of this allegation, the plaintiff in error further alleges that the deceased

"was also engaged in handling passenger baggage upon the express car of the said defendant railway company, and the defendant railway company states that the said William B. West, deceased, in performing said duties in handling said baggage, *was doing so under and by virtue of his said employment by the said American Express Company* (italics ours) and that such handling of such baggage by said West was for and in behalf of and under the direction of said railway company."

The plaintiff in error thereby expressly adopting the terms of said employment by the American Express Company, which was in writing, said contracts in writing being attached to the answer as exhibits, and which show that the defendant in error's intestate was an employee of the American Express Company, and not of the railway company.

There is no dispute but that the intestate handled express and baggage between points in one state, and also between points in one state and points in another state, but in doing this, under the pleadings in this record, he was the employé of the express company and acting for the express company in handling such baggage. Obviously, this was done by virtue of a contract between the express company and the railway company, but the railway company neither saw fit to plead this contract nor to offer it in evidence, and the presumption is that had profert been made of this contract it would have been against the contention of the plaintiff in error.

349 Paragraph 2 of the syllabus in *A. T. & S. F. Ry. Co. v. Davis & Young*, 26 Okla. 359, 109 Pac. 551, is as follows:

"When it is reasonably within the power of a party to offer evidence upon the facts and rebut the inferences which the circumstances tend to establish against him, and he fails to offer such proof to rebut same, the natural conclusion is that the proof, if produced, would support the inferences against him, and the jury is justified in acting upon that conclusion."

Nowhere in this record is any offer made to produce this contract or to show what the contract was. On the contrary, it appears from the record that the railway company sought to prove by circumstances what such contract was, without showing the contract or proving its contents. This of itself would indicate that if this contract were in evidence it would be fatal to their contention. However, the evidence offered for the purpose of showing that the defendant in error's

intestate was an employee of the plaintiff in error, which was excluded by the court, is not properly presented under the rules of this court here for review.

Rule 25, is as follows:

" * * * The brief shall contain the specifications of the errors complained of, separately set forth and numbered; * * *

The specifications of error in the brief of plaintiff in error are set out, beginning with page 71 and ending with page 81. Specifications of error numbered 2, 3, and 4, relate to the rejection of evidence. Specification No. 2 is as follows:

"The trial court erred in refusing to admit in evidence the application for a situation of William B. West with the Express Company which application contained the accident release executed by the said William B. West, the benefits of which inured to this plaintiff in error. Said application for situation and accident release being marked "Defendant's Exhibit A."

Specification No. 3 is as follows:

"The trial court erred in refusing to admit in evidence the application for a situation of William B. West with the Express Company, which application contained the accident release executed by the said William B. West, the benefits of which inured to this plaintiff in error. Said application for situation and accident release being marked "Defendant's Exhibit B."

Specification No. 4 is as follows:

"The trial court erred in refusing to admit in evidence the application for a situation of William B. West with the Express Company which application contained the accident release executed by the said William B. West, the benefits of which inured to this plaintiff in error. Said application for situation and accident release being marked "Defendant's Exhibit C."

No specifications of error having been predicated upon the exclusion of any other evidence tending to show that defendant in error's intestate was an employee, the same is not properly before this court for review, and for that reason we do not consider the same; for the further reason in the brief and argument of plaintiff in error, beginning with page 82 and ending with page 146, such is not attempted to be insisted upon or urged as error.

In *Noble State Bank v. Haskell et al.*, 22 Okla. 48, 97 Pac. 590, paragraph 7 of the syllabus is as follows:

"When the brief of the plaintiff in error, in any civil cause, fails to preserve, by specification of error, any point complained of in the lower court, such question is thereby waived in this court." Certain questions as to jurisdiction which cannot be waived are exceptions to this rule. *Citizens Bank & Trust Co. v. Dill* 30 Okla.

In addition to that, in the brief and argument the point is not urged, and the same can not be cured by a reply brief when the same is not predicated upon a specification of error, permission not having been first obtained for the purpose of amending the specifications of error. No such permission has been asked for or granted in this cause.

Under the issues as made, section 5945, Comp. Laws 1909 (Sec.

4313, Stat. Okla. Ter. 1893) applies. Said section is as follows:

351 "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Section 5946, Comp. Laws 1909 (Section 4314, Stat. Okla. Ter. 1893; section 4612, Wilson's Rev. and Ann. St. 1903) provides:

"That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in section 5945 of this article, is or has been at the time of his death in any other State or Territory, or when, being a resident of this State, no personal representative is or has been appointed, the action provided in said section 5945 may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

In the petition it is averred that the accident occurred in the State of Oklahoma; that the intestate at that time resided at Parsons, in the State of Kansas. The evidence in the record supports such averment. The action appears to have been properly brought. *Okla. Gas. & Electric Co. v. Lukert*, 16 Okla. 397.

The limitation of section 5945, supra, was removed by section 7, article 23 of the Constitution, which provides;

"The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

Sections 5945 and 5946, as modified by section 7, article 23, supra, were brought over by section 2 of the Schedule to the Constitution. *Tilley v. Overton*, 29 Okla. 292, 116 Pac. 945; *Olson v. Logan County Bank*, 29 Okla. 391; *Mayor and Councilmen of City of Pawhuska v. Pawhuska Oil & Gas Co. et al.*, 28 Okla. 563, 115 Pac. 353; *Ex parte McNaught*, 23 Okla. 285; *Ex parte Cain*, 20 Okla. 125.

Under the undisputed evidence in the record the American Express Company paid the intestate his salary, the railway company paying the express company for the handling of the baggage.

352 In *Sewell v. A. T. & S. F. Ry. Co.*, 78 Kan. 17, in the opinion on rehearing, it was held:

"In view of the Kansas statutes making a railroad company liable for all damages done to persons or property in consequence of any neglect on its part (Gen. Stat. 1901, sec. 5857), and for all damages done to any of its employees in consequence of any negligence of its agents or by any mismanagement of its engineers or other employees (Gen. Stat. 1901, sec. 5858), although an express company contracts with the railway company by means of whose trains it carries on its business that it assumes all risk of injury to its employees and undertakes to save the railway company harmless from

any claims with respect thereto, and contracts with one of its employees that neither it nor the railway company shall be liable to him for any injury occurring to him while traveling on any of such trains in the course of such employment, such employee may still maintain an action against the railway company for injuries received while so travelling in consequence of the negligence of its agents."

Under the laws of Kansas, as construed in said case by the highest court of that State, such contracts with the express company did not prevent the widow of the intestate from suing the railroad company for damages on account of his death.

It is not essential to determine whether the law of the place where said contract was entered into or the place where the injury occurred applies.

Section 36, article 9 of the Constitution of this State, known as the Fellow Servant Provision, defines the rights of the employees of railway companies in this State, at least as to intra-state matters.

By section 13 of article 9, the plaintiff in error is permitted to issue or give a free pass or free transportation, for use within this State, to defendant in error's intestate as an expressman. By section 8, article 23, said intestate was not permitted, by any contract or agreement, express or implied, to waive a right to recover for negligence as a passenger thereon by virtue of such free pass, for,

by sections 2 and 6 of article 9, the plaintiff in error is made a common carrier and a public highway, and thereby owed the defendant in error's intestate certain duties as a passenger, though he be travelling on free transportation. (See, also, sec. 8, art. 23.) In addition to that, it is the decidedly prevailing doctrine in this country that a passenger carrier cannot contract against the consequences of his own negligence when the carriage of the passenger himself is the subject of the contract. 2 Hutchinson on Carriers, 3rd Ed. (Matthews and Dickinson), section 1072, p. 1245, and authorities cited in footnote 47.

In either event, this contract is void as against public policy, on account of being in contravention of the laws of the State of Kansas and against the public policy of this State. (Secs. 1123 and 1124, Comp. Laws 1909.)

2. The court instructed the jury as follows:

"You are instructed that it is the duty of a railway company to conduct, maintain and run its trains used in its business in such a manner as to prevent injury to persons riding on said trains."

The undisputed evidence in this case shows that the railroad company was guilty of negligence. If such instruction was error, it would be without prejudice. St. Louis, I. M. & S. Ry. Co. v. Sweet, 80 Ark. 550, 31 S. W. 571.

3. It is contended that the court erred in excluding the two contracts heretofore referred to as "Exhibit A" and "Exhibit B." In view of the conclusion hereinbefore reached, such action was without error.

4. Is the amount of damages awarded in this case excessive?

The plaintiff in error requested the court to charge the jury as follows:

354 "If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained, and you are not to permit your sympathy to influence your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish. Your verdict must be based upon the financial loss in dollars and cents."

This instruction was refused, to which plaintiff in error excepted.

The court instructed the jury as follows:

"If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and, determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what would probably have been his life time, if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition."

It is insisted by the plaintiff in error that said instruction is deficient in two particulars, to which attention of the court was directed in requested instruction number seven, namely, that the plaintiff was not entitled to recover for the loss of the society of the deceased, nor for mental anguish. It would have been better practice for the court to have given this instruction. However, the instruction given, as to what was permitted to be included in pecuniary damages, seems to have been more favorable to the plaintiff in error than it was entitled to. The setting out in detail the elements of pecuniary damages to be considered by the jury in assessing the damage, in the event they found for the plaintiff, did not include loss of the society or mental anguish on account of the death of the intestate. The expressing in detail of the elements of pecuniary damage to be considered by the jury, excluded from their consideration all other elements of damage. Where an instruction reasonably and fairly presents an issue, a cause will not be reversed by this court

355 because an instruction presenting the issue in another form was refused by the lower court. *Press Publishing Co. v. Monteith*, 180 Fed. 356 C. C. A.; *Standard Oil Co. v. Brown*, 218 U. S. 78; 30 Sup. Ct. 669; 54 L. ed. 945; 31 D. C. App. 371.

As a matter of practice, however, trial courts should be careful in refusing instructions. When the trial court has given an instruction which covers the issue, on the theory that the expression of the one excludes the other, and a party to the suit asks an instruction which would expressly exclude such matters from the consideration of the jury which were by implication excluded in the general charge, the trial court, as a matter of precaution, should grant such instructions. For, in matters as to excessive verdicts, such a state of the record might be presented as to create such doubt as to constrain the reviewing court to reach the conclusion to a reasonable certainty that the verdict was excessive.

If trial courts, as well as the attorneys seeking verdicts in such courts, will co-operate and exercise more care in trying cases to the end that no prejudicial error shall be committed, there will be fewer

reversals. If attorneys would show the same zeal in the trial court to try a case so there would be no prejudicial or reversible error as they frequently do to sustain cases on appeal, where, on account of laches or want of care, they have permitted or caused to creep into the record doubtful questions of error, there would be fewer reversals by appellate courts. If the rule to so conduct the case as to reasonably recover without any error being committed in the trial, rather than the rule to win a verdict in the heat of the trial battle, without regard to the consequences on appeal, were more considered, appellate courts would be greatly aided.

In 4 Sutherland on Damages, Third Edition, section 1262, it is said:

"There is no dissent in the English decisions made since 1852 from the rule that damages cannot be awarded for mental suffering or loss of society, but must be restricted to pecuniary loss.

356 The language of Lord Campbell's act on this point is: 'The jury may give such damages as they may think proportionate to the injury resulting from such death to the parties respectively for whom or for whose benefit such action shall be brought.' Its title is 'an act for compensating the families of persons killed.' It also provides that the amount recovered shall be divided amongst the parties mentioned in it in such shares as the jury by their verdict shall find and direct. These provisions in it and the difficulty of apportioning the damages for solatium materially influenced the court in reaching the conclusion that only pecuniary losses are within the intent of the law."

The Canadian authorities are divided on this question. *St. Lawrence*, etc. R. v. Lett, 11 Can. Sup. Ct. 422; *Lett v. St. Lawrence*, etc. R., 11 Ont. App. 1, 1 Ont. 545; *Canadian Pacific R. Co. v. Robinson*, 14 Can. Sup. Ct. 105.

In New Zealand the English rule also prevails. *Greymouth-Point Elizabeth R. & C. Co. v. McIvor*, 16 N. Z. L. R. 258.

In *James v. Richmond & Danville Railroad Co.*, 92 Ala. 231, in an opinion by Chief Justice Stone, it is said:

"What is known in England as Lord Campbell's Act- 9 and 10 Victoria—was followed on this side of the Atlantic with legislative enactments on the same subject, by many State legislatures. Most of the statutes in America, which go into particulars, enumerate substantially the same descriptions of tort, whether of commission or of negligent omission, as did Lord Campbell's Act, in declaring the grounds on which this new statutory remedy may be successfully invoked. This has given rise to the phrase, found in many of the reported cases and text books, that statutes in this country are substantial copies of their English predecessor. It has been used by this court.—*M. & M. Railway Company v. Holborn*, 84 Ala. 133. The remark is true, so far as the several States assume to define the wrongs, for which they provide a mode of redress. That was the question in *Holborn's case*.

In declaring and defining the persons entitled to the benefit of the recovery, in cases in which death ensues from the injury complained of, the English statute has this language; 'That every such

action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury, resulting from such death, to *the parties respectively for whom and for whose benefit such action shall be brought.*' The italics are ours. This statute expressly directs the inquiry of damages, not to the injury, suffering or loss sustained by the deceased in the loss of life, but confines it to the injury suffered by the parties for whose benefit the suit is brought, namely, 'the wife, husband, parent, child' of the deceased, as the case may be."

357 The question of recovery for the pain and suffering of the intestate is neither involved nor claimed in this proceeding, as the intestate died instantly. *A., T. & S. F. Ry. Co. v. Rowe*, 56 Kan. 411. Section 5945 and 5946, *supra*, having been taken from Kansas, the construction by the highest court of that State prior to the time of their adoption by the Legislature of the Territory of Oklahoma, is binding on this court. *Farmer's State Bank v. Stephenson et al.*, 23 Okla. 695; *State ex rel. v. Cullison*, Judge, 31 Okla. 187, 120 Pac. 660. The damages recoverable under said sections have reference to a pecuniary loss. *St. Joseph & Western R. Co. v. Wheeler*, 35 Kan. 185; *A., T. & S. F. Ry. Co. v. Weber*, 33 Kan. 543; *C., K. & W. R. Co. v. Bockoven*, 53 Kan. 279.

See also, *Tilley v. Hudson River R. Co.*, 44 N. Y. 471; *Telfer v. Northern R. R. Co.*, 30 N. J. Law 188; *Safford v. Drew*, 3 Deut. 627; *Chicago & R. I. Railroad Co. v. Morris*, 26 Ill. 400; *Ill. Cen. Railroad Co. v. Weldon*, 52 Ill. 290; *City of Chicago v. Scholton*, 75 Ill. 468; *Chicago N. W. Ry. Co. v. Bayfield*, 37 Mich. 205; *Kesler v. Smith*, 66 N. C. 154; *Baltimore & O. R. Co. v. State*, use of Kelly, et al., 24 Md. 271; *Penn. R. Co. v. McClaskey*, 23 Pa. St. 526; *Same v. Vandever*, 36 Pa. St. 298; *Same v. Butler*, 57 Pa. St. 335; *Same v. Goodman*, 62 Pa. St. 329; *Johnson v. Cleveland & T. R. R. Co.*, 7 Ohio St. (N. S.) 336; *N. & W. R. R. Co. v. Johnson*, 38 Ga. 409; *Rose v. Des Moines Valley R. R. Co.*, 39 Ia. 246; *Orgal v. Chicago, B. & Q. Co.*, 46 Neb. 4; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 8 So. 260; *Bertha Geiger v. The Worthen & Aldrich Co.*, 66 N. J. Law 576; *Donaldson v. Miss. & Mo. R. R. Co.*, 18 Ia. 280; *Nashville & C. R. Co. v. Stevens*, 9 Tenn. 12; *Long v. Morrison*, 14 Ind. 595; *Malott, Receiver, v. Shimer, Admx.*, 153 Ind. 35.

In *Railway Company v. Maddry*, 57 Ark. 308, in an opinion delivered by Mr. Justice Hemingway, it is said:

358 "But while it is difficult, and may be impossible, to deduce from the authorities a uniform rule for determining what should, and what should not, be considered in estimating the damage in every case, a rule is deducible that favors the consideration of the loss of the mental, moral and physical training of the parent in a suit by his child. 3 *Suth. Dam.* (3d. ed.) sec. 1267; 2 *Sedg. Dam.* sec. 577; *Wood's Mayne on Dam.* p. 450; *Tilley v. Hudson R. R. Co.*, 24 N. Y. 471; *S. C. 29 N. Y. 282*; *McIntyre v. N. Y. C. R. Co.* 37 N. Y. 287; *Penn. R. Co. v. Goodman*, 62 Pa. St. 329; *Penn. R. Co.*

v. Keller, 67 Pa. St. 185; Balt. & Ohio. R. Co. v. Wightman, 29 Gratt, 431; Board of Commissioners v. Legg, 93 Ind. 523; Stoker v. Ry. 91 Mo. 509; Searle v. Ry 32 W. Va. 370; St. Lawrence R. Co. v. Lett, 11 Canada, 422; Pym v. G. N. R. Co. 2 Best & Smith (Eng.), 759; Castello v. Landwehr, 28 Wis. 522; Ill. Cent. R. Co. v. Weldon, 52 Ill. 290.

It was said by counsel for defendant upon the argument that, though cases growing out of the death of the mother might be found to support the rule, none such growing out of the father's death could be found. This is a misapprehension as to the authorities, for we have cited several cases to support it, growing out of the father's death. And, besides, it seems plain that though there may be a difference in the degree of advantage to the child growing out of the service ordinarily performed by the mother and that by the father, there can be none in kind; and if one is deemed as of pecuniary advantage, it seems to follow that the other would be held as of the same character.

"Upon the examination made by us, we find no case that antagonizes the rule stated, but we do find that in the cases that favor it there has not been entire unanimity among the judges. In the case of the St. Lawrence R. Co. v. Lett, 11 Can 422, the court approves the rule in an opinion that reviews the authorities, English and American, and sustains its conclusions by reasoning that we deem unanswerable; but in the report of the same case a dissenting opinion is found which maintains the contrary view with admirable force. We have not been able to disregard the persuasive effect of such a line of unconflicting decisions, or to discover that there is error in their conclusion. Its correctness depends upon the correctness of the following propositions; (1) That the age, observation and experience of the father fit him to assist in the physical, mental and moral training of his child; (2) that the natural affection of father for child affords a reasonable expectation that he will render the assistance that he reasonably can toward such training; and (3) that a proper development of the physical, mental and moral qualities of the child is of pecuniary value to him, either because it must otherwise be bought or because it is an aid in money-getting in after life. It seems to us that neither of the propositions, having reference to men generally, can be questioned; if not, it follows that the service of the father in training his child is of some pecuniary value, independent of what should never be considered—the happiness found in his love and companionship.

Objections raised to this conclusion, as we understand them are, not that the father's training is not a pecuniary advantage to the child, but that there are difficulties in the way of administering the rule that render it improbable that it was intended to prevail. The one most strongly urged is that there is no exact basis for estimating the value of the service lost; but this objection goes as well to the propriety of considering everything else that goes to show the value of the lost expectancy, and if it is to control the law would become valueless. To illustrate; proof is made that a father was able, by his industry, to earn a stated sum, and

this is considered in estimating the child's damage, upon the theory that the father would have lived out the average term of life, continued to receive the same sum and to appropriate it, in part at least, to those suing. The theory is destitute of an element of certainty, and is a compound of more or less remote probabilities. The father might not live the average term of life; or, if he did, might cease to earn money; and the child might die during his father's life, or, if he lived, might cease to receive aid from him, and be compelled to support him; or, if both should live out their expectancy, and the father continue to receive money and apply it in part to the child, the number of persons interested in the father's life might increase, and the share of the child correspondingly diminish. In no event is it possible to determine with certainty that any pecuniary benefit would have continued to the child, or, if it did, what it would have amounted to if the father's life had continued, and all that can be attempted is to make an estimate upon disclosed probabilities. Upon the same basis an estimate can be made of the money value of the father's probable service and care in educating and training the child, for it is no less susceptible of precise calculation than the extent or value of future receipts of property. Another objection is that the rule makes it to the interest of the defendant to show that the father was disqualified to train his child, and that it thereby instigates an unseemly and improper inquisition into the character of the dead; but this objection applies as well to considering his probable earnings. For it is equally as competent and important, in the latter case as in the former, for the defendant to rebut the probable expectancy of receiving money from the father by showing that he was idle, dissipated or thriftless and would probably have earned nothing, or that he was undutiful and would not have shared his earnings with his child.

The legislature must have known that the subject matter of the act did not admit of precision, and that the wrongs it sought to remedy could not be accurately measured; it must have known also that, in awarding to the living their rights under the law, it might become material to expose the ignorance, immorality, idleness, thriftlessness or undutifulness of the dead; and as the law was passed in face of the difficulty and disagreeableness of administering it, it becomes the duty of the courts to attempt to administer it in accordance with its letter and intent."

This decision was concurred in by Cockrill, Chief Justice, and Battle, Hughes and Mansfield, Associate Justices.

See, also, *St. Louis, I. M. & S. Ry. v. Sweet*, 60 Ark. 550, 31 S. W. 571; *St. Louis, I. M. & S. Ry. v. Haist*, 71 Ark. 258, 72 S. W. 893; *St. Louis, I. M. & S. Ry. v. Hitt*, 76 Ark. 227, 88 S. W. 908; *St. Louis & N. A. R. Co. v. Mathis*, 76 Ark. 185, 91 S. W. 763, 113 Am. St. Rep. 85; *St. Louis, I. M. & S. Ry. v. Standifer*, 81 Ark. 275, 99 S. W. 81; *Syas v. Southern Pac. Co.*, 140 Cal. 296, 73 Pac. 360; *Johnson v. Southern Pac. R. R.*, 154 Cal. 285, 97 Pac. 520; *Valenti v. Sierra Ry.*, 111 Pac. 95; *Simoneau v. Pac. E. Ry.*, 115 Pac. 320; *Anderson v. Great Northern Ry.*, 15 Ida. 513, 99 Pac. 91; *Anthony Ittner Brick Co. v. Ashby*, 198 Ill. 562, 64 N. E.

110; *Goddard v. Enzler*, 222 Ill. 462, 78 N. E. 805; *Sternfels v. Metropolitan St. Ry.*, 73 App. Div. 494, 77 N. Y. Supp. 309; *International & G. N. Ry. v. McVey*, 99 Tex. 28, 87 S. W. 328; *Chicago, R. I. & T. Ry. v. Porterfield*, 19 Tex. Civ. App. 225, 46 S. W. 919; *Houston & T. C. R. R. v. Ruthland*, 45 Tex. Civ. App. 621, 101 S. W. 529; *Gray v. Phillips*, 117 S. W. 870 (Tex. Civ. App.) *Wells v. Denver & R. G. W. Ry.*, 7 Utah, 482, 27 Pac. 628; *Chilton v. Union Pac. Ry.*, 8 Utah 47, 2- Pac. 963; *Norfolk & W. Ry. v. Cheatwood*, 103 Va. 356, 49 S. E. 489; *Hoadley v. International Paper Co.*, 72 Vt. 79, 47 Atl. 169; *Searle v. Kanawha & O. Ry.*, 32 W. Va. 370, 9 S. E. 248; *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518; *Duke v. St. Louis & S. F. R. R.*, 172 Fed. 684.

Contra: *Walker v. Lake Shore & M. S. Ry.*, 111 Mich. 518, 69 N. W. 1114, *Bradley v. Ohio River R. R.* 122 N. C. 972, 30 S. E. 8; *McCabe v. Narragansett E. L. Co.*, 27 R. I. 272, 61 Atl. 667.

But a child can recover for the loss of such advice only as would have had pecuniary value, in estimating which the age and situation of the parties is to be considered, and nothing can be included for the merely sentimental loss. *Demarest v. Little*, 47 N. J. L. 28; *Gulf, C. & S. F. Ry. v. Finley*, 11 Tex. Civ. App. 64, 32 S. W. 51; *Felt v. Puget S. E. Ry.*, 175 Fed. 477.

There must be proof that the deceased was fitted by nature or education, or by disposition, to furnish to his children instruction, or moral, physical or intellectual training, in order for the jury to consider the loss of instruction and moral training as an element of pecuniary damages. 361 Ill. Cen. R. R. v. *Weldon*, 52 Ill. 290; *Chicago, R. I. & P. R. R. v. Austin*, 69 Ill. 426.

"There is almost entire harmony in denying a recovery for the mental suffering of the beneficiaries of the deceased, to — as a solatium." 4 *Sutherland on Damages*, 3rd Ed., sec. 1263, p. 3704, and authorities cited in footnote 2.

Having adopted the Arkansas rule as to the measure of damages in case of death, when there is no question as to recovery for physical pain and suffering, the holdings of the Supreme Court of that State as to what is an excessive verdict, our statutes being practically the same, are persuasive.

In *St. Louis, I. M. & S. Ry. Co. v. Freeman*, 89 Ark. 326, it is said:

"It is contended that the verdict is excessive. Plaintiff's decedent was shown to have been twenty-four years of age, a man of good habits, healthy, intelligent and industrious. He left no children. The case was therefore stripped of all elements of damage except as to the amount of his probable contributions to those dependent upon him. The evidence tended to show a present earning capacity at the time of his death and contributions to his wife of \$900 per annum. It tended to show, also, and the jury were warranted in finding, that his earning capacity would probably have been increased—to what extent is a matter of speculation. It is shown that his wages had been increased from time to time, and that he was in line of promotion. According to the annuity tables, placing his contributions at \$900 per annum, computing at the rate of 6 per

cent. per annum, the recovery would have been for \$10,845. Making due allowances for the probable increase in his earning capacity, we are of the opinion that the evidence is insufficient to sustain a verdict for more than \$15,000."

See, also, *Pulaski Gas Light Co. v. McClintock*, 97 Ark. 576; *Tillar v. Reynolds*, 96 Ark. 358; *St. Louis, I. M. & S. Ry. v. Raines*, 90 Ark. 398; *St. Louis & N. A. R. Co. v. Mathis*, 76 Ark. 185, 91 S. W. 763; *St. Louis, I. M. & S. Ry. Co. v. Caraway*, 77 Ark. 405, 91 S. W. 749; *St. Louis, I. M. & S. Ry. Co. v. Hitt et al.*, 76 Ark. 227, 88 S. W. 908; *St. Louis I. M. & S. Ry. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571.

In *St. Louis, I. M. & S. Ry. Co. v. Freeman*, *Supra* only the widow survived, and, consequently, the element of pecuniary damages for the loss of the instruction, moral, physical and intellectual training or advice to the children, on the part of the parent, could not be considered in sustaining a verdict for \$15,000.

There the intestate was twenty-four years of age; here he is thirty-eight years of age, but in good health, of both mind and body, of strong physique, already having advanced his earnings four times, at the time of his death receiving \$83.33 per month. He was of good habits, industrious, ambitious and attentive to his family, and gave all of his earnings to his family except his personal expenses, not exceeding five dollars per month. He had been married about seventeen years and left surviving him three children, a girl about sixteen years of age, a boy about seven, another girl about two years of age, and a posthumous child, born about six weeks after the intestate's death.

When we consider the element of pecuniary damages as hereinbefore set out, we believe that the \$15,000 judgment rendered in this case should be sustained. Whilst the verdict may probably be on the maximum order line, yet we believe that all intendments permitted by the record to be drawn against the plaintiff in error, when so found by the jury, reasonably sustain the verdict.

5. As to the specification of error predicated upon the court's instructing the jury that three-fourths of their number could return a verdict, this contention is without merit. (Section 19, article 2 (Bill of Rights) Constitution; running section 27 (Williams' Ed.) and citations; *St. Louis & S. F. R. Co. v. Rushing et al.*, 120 Pac. 973.

The judgment of the lower court is affirmed.

All the Justices concur.

363 In the Supreme Court of the State of Oklahoma.

And thereafter to-wit, on the 27th day of June, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

IVOLUE B. WEST, Plaintiff in Error,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Defendant in Error.

On this the 27th day of June, 1912, it being shown to this Court that the plaintiff in error has, in good faith, filed a petition for rehearing herein, and that said petition is worthy of consideration by this court.

It is therefore ordered by the court that the mandate herein be stayed until fifteen (15) days after said petition for a rehearing shall have been passed upon by this Court.

JOHN B. TURNER,
Chief Justice.

Attest:

W. H. L. CAMPBELL, *Clerk*, [SEAL.]

By T. H. STURGEON, *Deputy*.

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In the Supreme Court of Oklahoma.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

vs.

IVOLUE B. WEST, Defendant in Error.

Application and Petition for Rehearing.

Now on this day comes the Missouri, Kansas & Texas Railway Company, Plaintiff in Error, and respectfully petitions this Honorable Court for a rehearing of this case, and for grounds of such petition, respectfully states that questions decisive of this case and duly submitted by counsel have been overlooked by the court in the decision rendered herein, and that said decision is in conflict with controlling decisions of this court, and of its predecessor, the Supreme Court of the Territory of Oklahoma, and also, the Supreme Court of the United States, to which the attention of the court was not called either in the brief or oral argument, and which have been overlooked by the court.

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Counsel for plaintiff in error respectfully asserts:

I.

That this court in its opinion and judgment herein misunderstood the pleadings.

II.

That this court in its opinion and judgment herein misunderstood the evidence.

III.

That this cause was tried on the theory that the issue was made by the pleadings, that the deceased, William B. West was an employé of the plaintiff in error, Railway Company, and that the evidence at the trial showed that he was such an employé, and under decisions controlling upon this court, to which the attention of this court was not called either in brief or in oral argument, this case must be decided by this court upon that theory.

IV.

Plaintiff in error did not waive its exceptions to the action of the trial court in sustaining the objections of the defendant in error to the evidence offered by the plaintiff in error, which evidence was corroborative of the evidence of the plaintiff in error establishing that the deceased, William B. West, was an employé of the plaintiff in error, for the reason that the parties, by their pleadings and in the trial of the case had assumed as an established fact that the said William B. West, at the time of the accident, was an employé of the plaintiff in error, and by reason of being such an employé had the right to be upon the train at the time of the injury, which said evidence referred to by the Supreme Court of the State of Oklahoma is a certain written communication dated July 21st, 1897, transmitted by F. D. Adams, as General Superintendent of the American Express Company to the said William B. West, reminding him that he was an employé of the plaintiff in error, Railway Company, as well as the American Express Company, in the performance of the duties which were the identical duties referred to in the defendant in error's petition in this cause, and which written communication, so far as applicable to the question is in words and figures as follows:

"In some instances I find there has been considerable controversy between messengers and train crews on joint runs in regard to your duties to the railroad company. Inasmuch as the railroad company pay- a portion of your salary you are just as much an employé of the railroad on which you run as you are of the express company, and you must be just as careful of their interests as you are of this Company, and perform your duties to that company as near as possible, in the same manner that they would be performed by exclusive baggagemen."

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V.

The Supreme Court of the United States has definitely decided that this action must be brought by the personal representative and not by the beneficiary, which decision is controlling upon this Court, and was not called to the attention of this Court either in the brief or oral argument for the reason that the decision was rendered on the 13th day of May, 1912, subsequent to the time that the briefs were filed in this cause, and only a few days before the oral argument herein, which was on the 20th day of May, 1912, and at the

time of that oral argument counsel for plaintiff in error had not been apprised of this decision, which is American Railway Co. against Birch, reported in Supreme Court Reporter (West Publication), Volume 32, at page 603.

VI.

That this Honorable Court seems to have misunderstood the instruction given and excepted to as to the measure of damages, and in the opinion holding that the instruction given by the Court on that question excluded all elements except those enumerated therein is an oversight, in that said instruction does not exclude any elements, but simply calls to the attention of the jury certain matters it may consider. This is not within the rule that all things not enumerated are excluded.

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VII.

That under the Act of Congress, which applies to this case, it was error to instruct the jury that three-fourths of their number could return a verdict.

369

I.

This court in its opinion and judgment herein misunderstood the pleadings.

The defendant in error sought to justify the presence of the deceased upon the train at the time of the injury by alleging in her petition that the plaintiff in error was engaged as a common carrier in carrying express, freight and passengers, the particular allegations being as follows:

"And as such, during all of said times, has been engaged in the railroad business in the States of Kansas and Oklahoma, and elsewhere as a common carrier of freight, express and passengers for hire."

(Par. 1, Petition, Case Made 2.)

"That during all the time mentioned said defendant corporation, as a part of its said railroad business, owned, and was engaged in operating a certain line of railroad extending from Saint Louis, Missouri, southerly to Parsons, Kansas, and thence from Parsons, Kansas, southerly to the stations of Verdard and Muskogee, in the State of Oklahoma, to points in the State of Texas, over which line of railway said defendant, during all the times herein mentioned, was actually engaged in carrying and transporting freight, express and passengers for hire by trains of cars drawn by steam locomotives by it owned, operated and maintained; that said line of railroad consisted of what is known as single track line, and was, and is, of the usual form of construction, and by said defendant owned and maintained."

(Par. 2, Petition, Case Made 2 & 3.)

370 "That at and prior to the time and death of said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by said defendant company over its said line of railroad between said city of Parsons, Kansas, through the State of Oklahoma to points beyond in the State of Texas; that in addition to his duty and employment as express messenger, as aforesaid, this said William B. West also engaged in handling passenger baggage upon the express cars of said defendant company."

(Par. 5, Petition, Case Made 3 & 4.)

"That on May 15th, 1908, at about 12 o'clock noon of said day, said William B. West, in the course of his employment as hereinbefore set out, was riding in one of the express cars of said defendant company attached to one of the regular trains of said defendant company over said railroad line in a southerly direction in the State of Oklahoma, which train was one of the regular passenger trains of said defendant known as "No. 5" and also known as the "Katy Flyer", and that when said train reached the point in said State of Oklahoma a short distance southerly of the Arkansas River, between the said stations of Verdark and Muskogee, in said State of Oklahoma, said train upon which the said William B. West was so riding, in the performance of his duties as aforesaid, was, by said defendant railroad corporation, through gross carelessness and negligence upon its part, etc."

(Par. 6, Petition, Case Made 4.)

These allegations are the only statements contained in the petition that attempt to throw any light upon the right of the deceased to be upon the train at the time of the accident.

371 A demurrer was filed to this petition by this plaintiff in error, and the Court overruled the demurrer upon the theory of the defendant in error, which was that the allegations above stated were sufficient to charge that the deceased was in the employ of this plaintiff in error, and, therefore, thus showed the right of the deceased to be upon the train at the time of the accident.

The Court overruled the demurrer upon that theory, as no other possible theory could be advanced for overruling the demurrer to the petition, as the petition did not charge that the American Express Company had any contract with this plaintiff in error, or any other person, to handle the express, and it is not charged that the American Express Company is engaged in handling express. The only inference to be drawn from these allegations is that the deceased was employed by the American Express Company as express messenger and baggageman for the plaintiff in error.

If this is not true, then the deceased was a trespasser and the petition would wholly fail to state a cause of action.

372 This Honorable Court, on page 9 of the opinion, states:

"It is insisted that the intestate was not in the employ of the plaintiff in error, but in that of the American Express Company. Under the issues as framed said intestate was an employé of the Express Company and not of the Railway Company."

Neither the answer of the plaintiff in error, the reply of the defendant in error or the rejoinder in any wise affects the allegation contained in the plaintiff's petition.

II.

This court in its opinion and judgment herein misunderstood the evidence.

At page 14 of the opinion of the court, it is said:

"Under the undisputed evidence in the record, the American Express Company paid the intestate his salary, the Railway Company paying the express company for the handling of baggage."

It is submitted that this statement as to the manner of the payment of salary to West is not fairly borne out by the record, and does not accurately reflect the testimony upon this proposition. The record can bear no other construction than that the Railway Company paid one half of West's salary, and did not pay the express company for handling of baggage, as stated in the opinion.

373 Beginning at page 172 of the record, Mr. F. D. Adams, General Superintendent of the Southern Division of the American Express Company stated that the deceased at the time of his death was a joint messenger and baggage man, and worked for both the express company and the plaintiff in error. Portions of his testimony were quoted in the reply brief of the plaintiff in error, at pages 32 to 35. It is not deemed necessary to again quote this testimony, but the attention of the court is respectfully directed thereto, because it shows conclusively that West was an employé of the Railway Company. The testimony of Mr. Adams is direct, positive, unequivocal and uncontradicted upon this proposition, and his language with reference to the payment of salary, which is misunderstood by this court, is as follows:

"Q. Do you know what proportion of his salary was paid by those companies (the express company and the railway company) or whether it was paid in any proportion?

A. Equal proportion." (Rec. p. 173.)

and upon cross-examination, Mr. Adams said:

"Q. Who paid West?

A. He drew his money from the express company.

Q. All of his salary came from the express company?

A. Yes sir.

Q. And for any work he done for them in handling baggage, the railroad company would pay over to the express company?

A. They paid us one-half of his salary; we drew a bill against them in his name and the other baggagemen." (Rec. p. 177-8)

374 It was further shown by the testimony and conceded by counsel for defendant in error, that the deceased handled baggage for the plaintiff in error, as its baggageman, as a joint employé of the two companies. The record is as follows:

"Mr. ALLEN: We offer to show by Mr. Adams that at the time Mr. West went into the service as messenger, he understood that it

was his (West's) duties to perform joint services for the railway company and the Express Company.

Mr. TAYLOR: Further than the matters offered to be shown and I admitted by the pleadings, we object to the offer as incompetent, irrelevant and immaterial." (Rec. p. 176).

This testimony of Mr. Adams that West was the joint employé of the railway company and the express company presented an issue and there was no evidence to dispute it.

"The court further misapprehended the evidence in the case on the questions of release contracts offered in evidence and excluded. Objection was made to the introduction of them because under the law of the State of Kansas they were void, but there is no evidence in the case proving, or tending to prove that the contracts, or any of them, were executed in the State of Kansas. Where the contracts, or any of them were entered into is not shown, and this court in its opinion seems to assume that the evidence shows that the contracts were made in the State of Kansas and that the decisions of the Supreme Court of Kansas are controlling.

375 This court further assumes that the deceased was riding on a free pass at the time of the injury, and was a passenger upon the train at that time and could not waive his rights against the negligence of the plaintiff in error, but there is no evidence whatever to establish the fact that West was riding upon a free pass. On the contrary, the evidence does establish that he was riding as a joint employé of the plaintiff in error and the express company, and, therefore, as far as this plaintiff in error is concerned, he did not in any respect bear the relation of a passenger, and the law as to the duties which the plaintiff in error might owe to a passenger has no application to this case. This case does not call for an opinion upon the duties which the plaintiff in error might owe to a passenger. Such a question was not presented by the pleadings, nor in the evidence, nor in the brief of counsel, and the court in discussing this proposition in connection with this case has clearly misapprehended the evidence as contained in the record.

376 This cause was tried on the theory that the issue was made by the pleadings that the deceased, W. B. West was an employé of the plaintiff in error, railway company, and the evidence at the trial showed that he was such an employé, and under decisions controlling upon this court, to which the attention of this court was not called either in the brief or oral argument, this case must be decided by this court upon that theory.

This court holds that the Federal Employer's Liability Act of April 22nd, 1908, 38 U. S. Stat. at L., at page 65, does not apply to this case and that the pleadings were not so framed as to present the issue whether the deceased was an employé of the railway company or the express company.

Page ten of the opinion of the court contains extracts from the petition and the third amended answer. The court holds that this third amended answer does not present the issue. "It is submitted that in this the court has erred, but the point to which the court's attention is directed in this petition, and which was not considered in the

opinion, is that this case was tried upon the theory that the issue was clearly defined by these pleadings. Counsel for the defendant in error understood that the issue was presented by the pleadings and proceeded throughout the trial as though it were presented.

377 Counsel for plaintiff in error understood that the issue was presented and introduced testimony that the deceased was an employe of the railway company and tried the case throughout upon that theory and the trial court construed the pleadings to present that issue, and directed the course of the trial upon that theory, and that theory controlled its action at the trial, its rulings with reference to the admissibility of evidence, and the giving and refusing of instructions.

It is the law that when a case is tried as though as issue were presented whether or not there is a word in the pleadings to justify the presumption, the appellate court in reviewing the case will consider it as though the issue were definitely defined by the pleadings. It is a well accepted doctrine and fully recognized by this court in previous decisions controlling upon this court, that a litigant cannot depart upon appeal from the theory of his case which he adopted in the trial court. This doctrine has been expressly announced by the Supreme Court of the Territory of Oklahoma in *Morrison v. Atkinson*, 16 Okla. 571, 85 Pac. 472, which decisions is controlling upon this court. The syllabus written by the court, reads as follows:

378 "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Hence, where a party assumes a position and asserts a legal right in the district court, and there asks the benefit of that position, he is estopped from denying the legality of that position on appeal to the Supreme Court."

In the body of the opinion, it is said:

"Now when they asked the court to enforce that rule, they in effect said that the rule was a valid one, and that they desired the benefit of it. The matter was tried in the court below on the theory that rule 19 should be enforced. The only question for the court to determine was, who was in default according to the terms of that rule. The determination of the court was unquestionably correct if the rule was a valid one; and, according to the doctrine laid down by the Minnesota Supreme Court in the case of *Davis v. Jacoby*, they cannot be heard to complain that the rule invoked was erroneous, if the result be correct according to the theory they adopted. In other words counsel for defendant below, in their motion for judgment, alleged that said rule 19 was legal, and pleaded that they had complied therewith, and that plaintiff below had failed to comply with the requirements thereof, and for that reason they asked that judgment be entered in said cause in favor of said defendant. Hence it is evident that the position now taken by counsel for said defendant is inconsistent with the position which they occupied when they filed and urged said motion for judgment for non-compliance with said rule 19."

379 The Supreme Court of the State of Kansas prior to the time that the Kansas Code was adopted in Oklahoma, held that where a case was tried as was the case at bar, upon the assumption that an issue was presented, that the appellate court will not take a contrary position, but will construe the pleadings as the same were construed by the parties in the trial court. In *Bent v. Philbrick*, 16 Kas. 190, decided in 1876, it is held that where a record fails to contain any reply to an answer alleging new matter, but the case was tried by both parties without any objection on account of the want of a reply, and as though a reply had been filed, that the Supreme Court will treat the case in the same way. In the opinion of the court, it is said:

"As no reply appears in the record, it would seem as though there were nothing to try and that the court, upon the pleadings, should have entered judgment for the \$500.00 and twelve per cent interest. But the case was tried by both parties as though the allegations of new matter in the answer was denied; and we shall take the case upon that basis, as in our judgment, upon that basis, there was such error as requires a reversal."

In *Holden v. Clark*, decided by the Supreme Court of Kansas, 1876, 16 Kas. 346, 347, it is said:

380 "Counsel for defendants in error raises the question that the plaintiff's reply was not verified by an affidavit, and therefore that it did not put in issue some of the allegations of the defendant's answer. The case was tried however in the court below, in the same manner as though it was considered by all the parties that the reply was sufficient, and therefore, this court will now treat the case in the same way."

In *Herbert v. Wagg*, 27 Okla. 674, decided by this court, this doctrine is succinctly stated in the syllabus which was prepared by the court, as follows:

"A Party bringing an action is required to frame his pleading in accord with some definite, certain theory, and the relief to which he claims to be entitled must be in accord therewith; on appeal he is bound by the position and theory assumed and on which the case was heard in the trial court."

In *M., K. & T. v. Wilhoit*, Circuit Court of Appeals, Eighth Circuit, 160 Fed. 440, it was contended in that court that the doctrine of assumption of risk could not be invoked because the issue was not raised by the pleadings. Mr. Justice Van De Vanter, then Circuit Judge, delivering the opinion of the court, said:

"The Court of Appeals was of opinion that this defense was not available to the defendant because it was not affirmatively pleaded in the answer. But the question of pleadings thus suggested was not raised upon the trial. On the contrary, as the record discloses, each of the parties, without objection from the other, introduced testimony addressed to the question of the plaintiff's assumption of risk, both presented requests for instructions bearing thereon, and the court charged the jury upon that subject. We must, therefore, give effect to the settled rule, that when the parties, with the assent of court, unite in trying a case on the theory that a particular matter

is within the issues, they will not be permitted to depart therefrom when the case is brought before an appellate court for review.

381 (Citing a large number of cases.)"

In *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 37 L. Ed. 292, it is said:

"As to paragraph 3 in brackets, it is contended by the defendant that the court should have directed the jury that the value of the cattle when delivered at the western terminus of the railroad of the defendant, in Ohio, and not their value at the final destination of the cattle in Saline County and Howard County, Missouri, should be the basis on which to estimate the damages. But it does not appear that any such claim was made in the court below. Both parties introduced their evidence and tried the cases on the theory that the value of the cattle in Saline and Howard counties was the proper basis for fixing the damages."

It is clear that counsel for defendant in error understood the allegations of the answer above referred to, charged that West was an employé of the railway company, because in reply to that answer, they specifically alleged and made a part of their reply, and quoted therein a statute in Kansas, making railway companies liable to employés for damages, in consequence of any negligence on the part of the railway company, or its employés. (Rec. p. 85-87). This statute, as quoted from the reply, reads as follows:

"Every railroad company organized and doing business in the State of Kansas shall be liable for all damages done to any employé of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employés, to any person sustaining such damage; provided, that notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury."

382 In view of this express allegation of the reply, it is evident that counsel for defendant in error thoroughly understood the answer to present the issue that West was an employé of the railway company, and they sought to meet it by confessing that fact and seeking to avoid its effect by virtue of the provisions of the statute. These allegations of the reply cannot be anything else but an express admission that West was an employé of the railway company. If it were necessary for any stronger evidence of the fact that the issue was joined, it is clear from the further conduct of counsel for defendant in error in relying upon the three Kansas cases, *Sewell v. A. T. & S. F. Ry. Co.*, 96 Pac. 107, *A. T. & S. F. Ry. Co. v. Fronk*, 74 Kas. 915, 18 Pac. 968; *Kas. Pac. Ry. Co. v. Peavey*, 29 Kas. 169, 44 Am. State Rep. 630, sustaining judgments for damages in favor of the railway employés, to show that the statute in question was applicable to this case. Their conduct in this particular thus constituted a further express admission that West was an employé of the railway company.

The trial court construed the pleadings to present the issue. This is evidence from that fact that when counsel for plaintiff in error

introduced proof of the relationship which West bore to the railway company, and counsel for defendant in error made an objection, the court called their attention to the fact that they had pleaded that West handled the baggage for the railway company. The record as to these proceedings, is as follows:

383 "Q. At the time do you know what relation existed between Mr. West and the M. K. & T. Railroad Company with reference to handling baggage of that company? A. Yes sir.

Q. What was that relation Mr. Adams?

Mr. TAYLOR: I would like to ask first if there was anything in writing, any written agreement?

By the COURT: Don't you plead, Mr. Taylor, he also handled passenger baggage?

Mr. TAYLOR: Yes, sir, we plead it." (Rec. p. 172-3.)

Thereupon the witness was permitted by the court to testify that West was an employé of both companies, and was paid his salary in equal proportion by both companies. The testimony of this witness, Mr. F. D. Adams, General Superintendent of the Southern Division of the American Express Company, upon this proposition is quoted at pages 32 to 35 of the reply brief of plaintiff in error. This testimony is positive that West was a joint employé of both companies. The trial court should not have admitted this testimony had it been of the opinion that the pleadings did not require it to do so. As further proof of the construction which the trial court placed upon these pleadings, it overruled an objection of counsel for defendant in error to an offer of counsel for plaintiff in error, to prove by Mr. Adams, that West understood that he was to perform joint service for the railway company and the express company and permitted proof of this character to go to the jury. The record is as follows:

384 "Mr. ALLEN: We offer to show by Mr. Adams that at the time Mr. West went into the service as messenger he understood that it was his (West's) duty to perform joint services for the railway company and the express company.

Mr. TAYLOR: Further that the matters offered to be shown and I admitted by the pleadings, we object to the offer as incompetent, irrelevant and immaterial.

By the COURT: I think I will let him answer the question; objection overruled.

Mr. TAYLOR: The plaintiff excepts." (Rec. p. 176.)

If the court had been of the opinion that the issue was not joined, it undoubtedly would not have permitted this testimony to go to the jury.

The court further permitted the plaintiff in error to introduce testimony as heretofore shown that the railway company paid one half of the salary of the deceased, and the purpose for which this testimony was offered was stated by counsel for plaintiff in error, at record page 174, as follows:

"Mr. RALLS: We offer this for the purpose of showing that the deceased was a joint employé of the American Express Company

and the M. K. & T. Railroad Company, while he was running as messenger on the line."

The court with the full understanding of the purpose of this testimony, admitted it over the objection of counsel for defendant in error, and there certainly was not the slightest misunderstanding on the part of the court, or of any one connected with this case that this issue was clearly and distinctly drawn, and it — manifest that the case was tried throughout on the theory that there was such an issue to be determined.

385 As further proof of the fact that this case was tried upon the theory that West was an employé of the Railway Company, it will be noted that it never occurred to counsel for defendant in error that such was not the theory of the case until it was suggested by a member of this court at the oral argument, that possibly the pleadings did not raise the issue. Counsel for defendant in error then seized upon the point and urged it as best they could at the oral argument and later filed a typewritten brief in answer to the reply brief of the plaintiff in error, where this point is enlarged upon. It is respectfully submitted that this court even if there had been any merit in this point should not have considered same, because it was not within the theory of the case, nor within the propositions urged by counsel for defendant in error upon the appeal of this case. This circumstance of counsel for defendant in error is proof conclusive that all parties to this suit understood that the question of West's employment with the Railway Company was a provable fact under the issues in this case.

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IV.

The plaintiff in error did not waive its exceptions to the action of the trial court in sustaining the objections of the defendant in error to the evidence offered by the plaintiff in error and made a proper offer for the introduction in evidence of the contract between the express company and the plaintiff in error.

The original brief on the part of the plaintiff in error was written upon the theory that West was a joint employé of the Railway Company and the Express Company, and the record fully bears out that fact. The evidence offered by the plaintiff in error, and which was excluded by the trial court, and which this Court holds was not properly presented to it under its rules for review, was corroborative of evidence of the plaintiff in error establishing that the deceased was an employé of the plaintiff in error, and the parties, by their pleadings and in the trial of the case, assumed as an established fact that West, at the time of the accident, was an employé of the plaintiff in error, and by reason of being such an employé had the right to be upon the train at the time of the injury. The evidence referred to by the Supreme Court is a written communication dated July 21, 1897, transmitted by F. D. Adams, as General Superintendent of the American Express Company, to the said West, reminding him that he was an employé of the plaintiff in error as well as the American Express Company in the performance of the duties

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which were the identical duties referred to in the defendant in error's petition in this cause, and which written communication, so far as applicable to the question under consideration, is as follows:

"In some instances I find there has been considerable controversy between messengers and train crews on joint runs in regard to your duties to the railroad company. Inasmuch as the railroad company pay a portion of your salary you are just as much an employé of the railroad on which you run as you are of the express company, and you must be just as careful of their interests as you are of this company, and perform your duties to that company, as near as possible, in the same manner that they would be performed by exclusive baggagemen."

This fact as to the employment of West was not questioned by defendant in error until her counsel filed their brief, and counsel for plaintiff in error had no reason whatever to believe that counsel for defendant in error, in view of this record, would assume the position which they did in their brief, that there was no proof of this joint employment.

There was no necessity whatever for presenting to this Court this error in excluding testimony, and if such error had been presented in the original brief of plaintiff in error, the brief would have been subject to the criticism that it was inconsistent. Had counsel for plaintiff in error had the slightest intimation that counsel for defendant in error would take the position which they did in their brief and oral argument, which is entirely at variance with the record, and that this Court would adopt that position as correct, regardless of this inconsistency, they would have presented to this Court the error of the trial court in refusing to admit this evidence, but probably would have been met with the answer that in view of the undisputed testimony in the record that such error was harmless.

It is submitted that the record in this case does not call for an opinion as to whether or not there was error in the trial court in excluding this testimony, and for that reason the point was not presented in the original brief, and the attention of the Court was called to it in plaintiff in error's reply brief, because counsel for defendant in error had assumed such an anomalous position in their brief that if this Court adopted that position the error of the trial court in excluding this testimony became manifest.

This question as to the employment of West by the Railway Company should not be treated thus lightly, and the entire record upon this proposition disregarded merely because the trial court excluded one item of that proof, and that action of the trial court is not assigned as error. The question whether the defendant in error can recover in this case depends entirely upon whether West was an employé of the Railway Company. Therefore this question of employment is one of paramount importance in this case, and in the opinion and holding of the Court this important fact is not considered, but is swept aside as of little or no importance.

This Court states in its opinion that the plaintiff in error did not see fit to plead nor to offer in evidence the contract between the Rail-

way Company and the Express Company, and asserts that the presumption is that such contract would have been against the contention of the Railway Company. It is conceded that the contract was not pleaded, and it was not necessary to plead same, because proof of the employment of West by the Railway Company could properly be made and was made regardless of the written contract, but the record in this case does not fairly support the statement in the opinion that at no place in this record was any offer made to produce this contract or to show what the contract was, because the record affirmatively shows that the predicate was laid and the offer made for the introduction of this contract. The contracts between the Express Company and the deceased were first offered in evidence, but were not admitted by the court. The orderly method of procedure was to offer these contracts between the Express Company and the deceased first in point of time, and to follow them by the contract between the Express Company and the Railway Company, and counsel for plaintiff in error, observing the logical sequence for the introduction of testimony, offered to follow up these contracts between the Express Company and the deceased by introducing the contract between the Express Company and the Railway Company. The record showing these proceedings is as follows:

"And we expect to follow that up by showing that the American Express Company did enter into a contract releasing the M., K. & T. Railroad Company from liability for any of the accidents provided for in this application and that the accident which caused his death was one that was covered by the provisions of this application and that it released the M., K. & T. Railroad Company from any liability on account of the death of West and the witness we had on the witness stand was to show the signature of West and to show further that he was employed and worked under the terms of these contracts." (Rec. p. 167.)

It would have been entirely useless and would have served no purpose, but to encumber the record, to proceed further with this offer or to attempt to put this contract into the record, in view of the ruling of the trial court in declining to admit the other contracts.

It is stated in the opinion that the conduct of the Railway Company indicates that if this contract were in evidence it would be fatal to its contention, and that the presumption arises that had proffer been made it would have been against the contention of the plaintiff in error. In order to set the court right upon this proposition, and to show that there was absolutely no intention of concealment whatever on the part of the plaintiff in error, but that it was proceeding strictly in accordance with law in the introduction of its testimony, a copy of this contract is attached to this petition and marked "Exhibit A," and it will be observed from an examination of this contract that it shows conclusively that West was an employé of the Railway Company. Article Eleven provides in part as follows:

"Provided, however, that in all cases where the same person acts jointly as Baggage-man for the Railway Company and Express Messenger for the Express Company, then that any sum or sums paid

out in settlement or satisfaction of any claims made or judgment recovered on account of injuries sustained by such joint employé in the course of such joint employment while upon the road of the Railway Company shall not be assumed or borne by the Express Company, exclusively, but shall be borne and paid by both the Railway Company and the Express Company in the same proportion as they may have contributed to the salary of such joint employé at the time such injuries are sustained by him, but neither party, however, shall have the right to compromise or settle any claim or suit for such injuries without the consent in writing of the other party hereto."

393 The case of A., T. & S. F. Ry. Co. against Davis and Young, 26 Oklahoma 359, 109 Pacific 551, cited in support of the opinion upon this proposition is not in point. In that case there was no offer whatever made of the testimony as in the case at bar, and this contract would have been in the record had it not been that the court sustained the objection of counsel for defendant in error to the introduction of it, together with the other contracts offered in evidence.

It is respectfully submitted that the opinion of this Court is in error upon these propositions and should be re-considered, and instead of announcing that the errors of the trial court with reference to the introduction of testimony were waived, should lay down as the law that regardless of these two items of testimony the record in this case shows undisputably that West was an employé of the Railway Company, and the case should be determined by this Court upon that theory, and upon no other.

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V.

The Supreme Court of the United States has definitely decided that this action must be brought by the personal representative, and not by the beneficiary, which decision is controlling upon this court.

On the 13th day of May, 1912, only a few days before the oral argument in this case, there was handed down by the Supreme Court of the United States a decision in the case of American Railway Co. of Porto Rico against Birch, reported in Supreme Court Reporter (West Publication), Volume 32, at page 603, wherein the Supreme Court decides clearly that actions under the Federal Employers' Liability Act must be brought by the personal representative and cannot be brought by the beneficiary. In the opinion by Mr. Justice McKenna, it is said, in answer to the contention that the beneficiary could maintain the action:

"But the words of the act will not yield to such a liberal construction. They are too clear to be other than strictly followed. They give an action for damages to the person injured, or, 'in case of his death, * * * to his or her personal representatives.' It is true that the recovery of the damages is not for the benefit of the estate of the deceased, but for the benefit 'of the surviving widow or husband and children.'

395 "But this distinction between the parties to sue and the parties to be benefitted by the suit makes clear the purposes of Congress. To this purpose we must yield. Even if we could

any, as we cannot, that it is not a better provision than to give the cause of action to those in relation to the deceased. In the present case it looks like a useless circumlocution to require an administration upon the decedent's estate, but in many cases it might be much the simpler plan and keep the controversy free from elements but those which relate to the cause of action. But we may presume that all contending considerations were taken into account and the purpose of Congress expressed in the language it used.

"* * * The national act gives the right of action to personal representatives only."

In view of the fact that West was an employé of the Railway Company, and this fact is undisputed in the record in this case, this decision of the Supreme Court of the United States is controlling and fully determines the rights of the parties.

VI.

This honorable court seems to have misunderstood the instruction given and excepted to as to the measure of damages, and in the opinion holding that the instruction given by the court on that question excluded all elements except these enumerated therein is an oversight in that said instruction does not exclude any elements, but simply calls to the attention of the jury certain matters it may consider. This is not within the rule that all things not enumerated are excluded.

The plaintiff in error had the right to have the jury instructed that they should not consider mental anguish or loss of society.

"Each party has the right to have the jury instructed upon the law of the case clearly and pointedly, so as to leave no reasonable grounds for misapprehension or mistake, and if the instruction of the court fail thus to instruct it is error to refuse one calculated to cure the omission."

Brickwood Sackett Instructions, Volume 1, Section 156, and authorities cited.

The failure to give this charge cannot be said to be harmless error, as this Court, in its opinion, admits that the amount of recovery is right at the verge, and the probability of a jury being influenced in assessing its damages by such hideous photographs as shown in the evidence of the defendant in error at pages 218 and 219 would naturally arouse the sympathy of the jury and cause the jury to review the accident resulting in death.

VII.

Under the act of Congress, which applies to this case, it was error to instruct the jury that three-fourths of their number could return a verdict.

It is submitted that that portion of the decision holding that there was no error in the Court instructing the jury that three-fourths of their number could return a verdict is erroneous. If this were a case controlled exclusively by the State Laws the question would be different, and it may be that the decision of this Court under a case

controlled by State Laws is correct, but it is not necessary to consider that question in this petition for a re-hearing, because such is not the case presented to this Court. Under the Constitution of the United States there must be a unanimous verdict of the jury, and this cause of action arises under the Federal Employer's Liability Act, and Congress derived its authority to pass this Act by virtue of the Constitution of the United States, and all questions in this case must be decided under that Constitution and the Acts of Congress passed in pursuance thereof. This portion of the opinion of the Court is, therefore, in error, because it is predicated upon the erroneous theory that West was not an employé of the Railway Company, and upon the further erroneous theory that the Constitution of the United States and the Acts of Congress above referred to do not apply to the case.

Wherefore, plaintiff in error prays that it be granted a re-hearing herein, and that upon such re-hearing the opinion of this Court heretofore rendered herein be reversed, and that the judgment which this opinion sustains be reversed, and that judgment be rendered in favor of this plaintiff in error, and further that it be restored to all the rights and privileges which it has lost by reason of the several errors herein complained of, as well as the errors of the trial court.

CLIFFORD L. JACKSON,

W. R. ALLEN,

M. D. GREEN,

J. G. RALLS,

Attorneys for Plaintiff in Error.

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"EXHIBIT A."

This agreement made and entered into this 23rd day of September, 1902, by and between the Missouri, Kansas & Texas Railway Company (of Kansas), part; of the first part, hereinafter designated as the "Railway Company" and the American Express Company, (a joint stock association), party of the second part, hereinafter designated as the "Express Company."

Witnesseth that,

Whereas, the Railway Company is the owner of and operates the following lines of railway, namely:

	Miles.
St. Louis (Texas Junction) to Red River	629.2
McBaine " Columbia	8.8
Hannibal " Franklin Junction	104.5
Walker " El Dorado Springs.....	13.9
Kansas City Junction " Paola	86.4
Junction City " Parsons	156.8
Moran " Iola	13.4
LaBette (Mineral Jct.) " Mineral	15.6
McAlester " Krebs	4.2
Paola " Coffeyville	124.9
Mineral " Joplin	29.1
Atoka " Coalgate	14.1

1,200.9

And whereas, the Railway Company operates its passenger trains over the following lines of railway under contracts with the owners thereof, namely:

	Miles.
Texas Junction to St. Louis.....	26.9
Paola to Kansas City.....	43.0
Iola to Piqua.....	7.1

And whereas, The Railway Company has projected the construction of the following lines of railway and upon the completion thereof will operate its trains thereover, namely:

	Miles.
Stevens to Oklahoma City.....	172.84
Fallis to Guthrie.....	22.75
Wybark to Cleveland.....	79.03

And whereas, during the life of this contract the Railway Company may build or acquire other lines of railway or operate its passenger trains over additional lines upon trackage rights contracts:

400 And whereas, the Express Company is now conducting an express business over the lines of railway of the Railway Company, which contract expires on February 1st, 1903, and desires to continue to operate its business over the lines of railway of the Railway Company.

Now, Therefore, in consideration of the premises, and of the mutual covenants herein contained to be by each of the parties hereto respectively kept and performed, it is agreed as follows:

Article I.

In consideration of the payments, covenants and agreements to be by the Express Company duly made, kept, performed and observed, the Railway Company hereby agrees to transport in cars or car compartments, properly lighted and warmed, at its expense, and attached to its passenger trains each way daily, the messengers, safes, packing trunks, and express matter of the Express Company to and from all stations upon its lines of railway and branches which it now owns or is operating its trains over as above described, and over the projected lines when operated by the Railway Company as above described, provided, that on the lines of railway between Texas Junction and St. Louis, Paola and Kansas City, Iola and Piqua, the Express Company shall do no local business.

Article II.

It is understood that the word "messengers" as used in Article I hereof shall comprize only such persons as accompany the freight and valuables of the Express Company; and the Railway Company agrees to transport such messengers and such other agents as the Express Company may necessarily send over the Railway Company's lines in the transaction of its business as express carrier, free

of other charge than the consideration embraced in this contract, provided the properly authorized officers of the Express Company make application in writing for passes for such messengers or agents.

Article III.

The Railway Company shall also provide and allow the Express Company free approach and access to all depots, station premises and trains, and reasonable time to load and unload express matter upon and from these trains.

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Article IV.

The Railway Company will also, as far as it can conveniently do so, and without charge therefor, permit the Express Company to use a portion of its station houses on the lines herein mentioned for the reception, safekeeping and delivery of express matter carried under this agreement. The Express Company will also be permitted, when agreeable to the Railway Company, to employ as its agents any agent of the Railway Company whenever such employment by the Express Company shall not conflict with their duties to the Railway Company; the Express Company to be liable for the acts of such agents done by them within the scope of their authority as employees of the Express Company, but not otherwise.

Where the same person is employed as agent by the Express Company and the Railway Company the delivery by such person to the express messenger on the train, money packages belonging to or consigned to the Railway Company by such person shall constitute the delivery to the Express Company; and the delivery to such person of money packages addressed to the Railway Company consigned to such person shall constitute a delivery by the Express Company.

Article V.

The Railway Company further agrees to transport free at its risk over its lines covered by this agreement the horses, wagon-, safes, and material necessary to be used by the Express Company at the various points on said lines in the transaction of the business contemplated by this agreement.

Article VI.

The Railway Company further agrees that none of its employees, for himself or for the Railway Company, shall be allowed during the continuance of this agreement to transport money, valuable packages, goods, or merchandise of any kind whatsoever, except regular passenger baggage, and supplies for the Railway Company's eating houses, upon the passenger trains of the said Railway Company, except that the Railway Company reserves the right to transport dogs on its passenger trains, when accompanied by owners, and also to transport corpses.

Article VII.

It is further understood and agreed by the parties hereto that the Railway Company will not contract with any other party or parties to do any express business over said road or any portion thereof during the existence of this agreement.

Article VIII.

It is further agreed by the Railway Company that if other lines of railroad are constructed, leased, operated or acquired by the Railway Company during the life of this agreement, the express company shall have the same exclusive facilities on all such lines in so far as the Railway Company can legally grant such facilities. It being understood that if the Railway Company, by its trackage arrangements with other railroad companies, which it may deem best to make hereafter, or if it is compelled by legislation or judicial proceedings to grant to any other express or transportation company facilities for carrying on an express business on its lines, or any part of same, the revenue derived from the facilities so afforded such other express or transportation company shall be credited to the Express Company in its payments provided for under Article IX of this agreement; and it is further agreed that the compensation to be charged such other express or transportation company or companies shall not be less than the compensation provided for under the ninth article of this agreement for the same service.

Article IX.

In consideration of the execution of this agreement and the performance by the Railway Company of its several agreements set forth herein, the Express Company hereby agrees to make payments to the Railway Company as follows, to-wit:

(1) To pay monthly to the Railway Company, or, or before the 10th day of each month, the sum of Eleven Thousand and Seventeen and Eighty eight Hundre-ths Dollars (\$11,017.77), which payments shall be made by the Express Company to the Treasurer of the Railway Company at New York.

(2) The Express Company further agrees that when the projected lines of the Railway Company in the Indian Territory and Oklahoma as above described are completed and the Railway Company begins the operations of its passenger trains thereover, in consideration of such additional exclusive express facilities, 403 the guaranteed monthly payment by the Express Company shall remain Eleven Thousand and Seventeen and Eighty Eight Hundre-ths Dollars (\$11,017.88) per month.

(3) The Express Company also agrees that on or before May 1st succeeding January 31st of each year covered by this agreement, it will render to the Railway Company a statement showing the gross revenues derived by the Express Company on business transacted by it on the lines embraced in this agreement, and also the gross revenues derived by it on the lines embraced in this agreement

of even date herewith between the said Express Company and the Missouri, Kansas & Texas Railway Company of Texas for the preceding year ending with January 31st, and the Express Company further agrees that if fifty (50) per centum of the gross revenues derived by the said Express Company from the business transacted by it upon the lines of railway of the Missouri, Kansas & Texas Railway Company (of Kansas) and the Missouri, Kansas & Texas Railway Company of Texas, as shown by said statement, shall exceed the sums already paid by said Express Company to said two Railway Companies for the facilities rendered during the period covered by said statement, it will forthwith pay to the said two Railway Companies the amount of such excess sum, and that such payment may be made to the said Missouri, Kansas & Texas Railway Company (of Kansas), partly of the first part hereto, and by it divided between itself and the Missouri, Kansas & Texas Railway Company of Texas in such proportions as may be agreed upon between them.

It is expressly understood and agreed, however, that the express Company shall only account to the Railway Company for twenty five (25) per centum of the gross revenue derived from the transportation of money.

The gross revenue from matter carried wholly upon the lines of said two Railway Companies shall be deemed to be the whole amount received by the Express Company from such matter, not including the charges due to or advanced to other express or transportation lines or persons.

The gross revenue derived from express matter carried by the said Express Company partly upon the lines of said two Railway Companies, or one of them and partly upon other lines, shall be such proportion of the total revenue derived from such transportation as the distance carried over said two Railway Companies' lines, or either of them, bears to the entire distance such matter is carried by the said Express Company.

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Article X.

The Express Company agrees to give to the Railway Company at any and all times full and free access to all books and records of accounts of the business embraced in this agreement.

Article XI.

It is further mutually understood and agreed by and between the parties hereto that the Express Company will assume all risk and damage to its property, freight and valuable packages, and also assume all risk and damage to its agents and messengers while on said road in the course of their employment, including damages arising from the negligence or carelessness of the agent or employees of the Railway Company; provided, however, that in all cases where the same person acts jointly as Baggage-man for the Railway Company and Express Messenger for the Express Company, then that any sum or sums paid out in settlement or satisfaction of any claims made or judgments recovered on account of injuries sustained by

such joint employé in the course of such joint employment while upon the road of the Railway Company shall not be assumed or borne by the Express Company, exclusively, but shall be borne and paid by both the Railway Company and the Express Company in the same proportion as they may have contributed to the salary of such joint employé at the time such injuries are sustained by him, but neither party, however, shall have the right to compromise or settle any claim or suit for such injuries without the consent in writing of the other party hereto.

Article XII.

It is agreed that the Express Company will transport all money and valuable packages the property of the Railway Company, free of charge over its said roads and over all lines operated or controlled by the Express Company, and deliver the same at proper places of delivery on same or at the termini thereof, subject to conditions named in the Express Company's printed form of receipt. The Express Company will also transport all matter, property of the Railway Company, over the lines of the Railway Company free of charge.

The Express Company will also transport free of charge the railroad tickets of the Railway Company between Chicago and
405 St. Louis and will transport free of charge the folders of the Railway Company between any points on all lines of the Express Company, this in consideration of a full page "add" of the Express Company's business in said folders; all shipments of the Railroad Company's tickets and folders to be so marked.

The Express Company will also transport free of charge over its lines matter of any kind, property of the Railway Company, where such shipments do not exceed twenty (20) pounds in weight between any points reached by said Express Company, and will charge on shipments exceeding twenty (20) pounds in weight, the property of the Railway Company, to or from any points reached by the Express Company, off the lines of the Railway Company, and the Missouri, Kansas & Texas Railway Company of Texas, seventy five (75) per cent of its regular tariff on such shipments; provided, further, that the above rates shall also apply on the business of the Southwestern Development Company, being an associated company of the Railway Company.

Article XIII.

The Express Company agrees that it will not issue any local rates per hundred pounds between points on the Railway Company's lines which shall be less than one and one half ($1\frac{1}{2}$) times the Railway Company's freight rate per hundred pounds on the same commodity, between the same points, unless consent to the contrary has been obtained from the Traffic Manager of the Railway Company, provided, however, that no restrictions shall be placed by the Railway Company on the charge to be made by the Express Company on news matter or parcels, and provided, also that the Express Company

shall be permitted to make such rates between competitive points as will enable it to compete successfully with other express companies operating on other lines of railway, the Express Company agreeing to notify the Railway Company of any reduction in rates made on account of competition, and when such competitive rates are reduced to one and one half ($1\frac{1}{2}$) times the freight rates of the Railway Company on the same commodity, the Express Company agrees that no further reduction shall be made in such competitive rates without the consent of the Railway Company.

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Article XIV.

Operations under this contract shall commence on the first day of February, A. D. 1903, and continue in full force and effect until the first day of February, A. D. 1913, being the full term of ten (10) years.

In Witness, whereof, the parties hereto have caused this agreement to be executed on the day and year first above written.

MISSOURI, KANSAS & TEXAS
RAILWAY COMPANY,

By HENRY C. ROUSE, *President*.

Attest:

[SEAL.] R. W. MAGUIRE,
Ass't Secretary.

AMERICAN EXPRESS COM-
PANY,

By A. ANTISDEL,
General Manager.

Copy.

407 STATE OF OKLAHOMA,
Muskogee County, ss:

M. D. Green, of lawful age, being first duly sworn states on oath that he is one of the attorneys for the plaintiff in error, Missouri, Kansas & Texas Railway Company, and makes this affidavit on its behalf; that he served the within and foregoing application and petition for rehearing on Benjamin Martin, Jr., one of the attorneys of record for the defendant in error, at 9:20 o'clock P. M. on the 25th day of June, 1912, by delivering to him a true copy thereof, at Muskogee, Muskogee County, Oklahoma.

M. D. GREEN.

Subscribed and sworn to before me this 25th day of June, 1912.

[SEAL.]

GEO. A. LOWELL,
Notary Public.

My commission expires August 1, 1915.

Endorsed: In the Supreme Court of the State of Oklahoma. No. 1928. Missouri, Kansas & Texas Railway Company, Plaintiff in

Error, v. Ivolue B. West, Defendant in Error. Application and Petition for Rehearing, together with Proof of Service upon Defendant in Error. Filed Jun- 26, 1912. W. H. L. Campbell, Clerk.

408 In the Supreme Court of Oklahoma.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,

vs.

IVOLUE B. WEST, Defendant in Error.

Answer to Application for Re-hearing.

I.

At pages 3 to 6 inclusive of the Application of Plaintiff in Error for a Re-hearing, Counsel assume that unless West was an employee of the Railroad he was a trespasser without right of recovery. But the Petition shows that he was riding as Express messenger under employment of the Express Company in the Express car. If he was a mere Trespasser it would be a matter of Defense to be pleaded. The answer admits the allegations of the Complaint in relation to this, and that at the time of his death he was handling Express and the personal Baggage under and by virtue of his employment with the Express Company. As a matter of fact the paper which Counsel for Plaintiff in Error have marked Exhibit A, shows that as far as the Railroad was concerned the Express Messenger was a passenger, for in "Article II," is the following: "and the Railway Company agrees to transport such Messengers and such other agents as the Express Company may necessarily send over the Railway Company's lines in the transaction of its business as express carrier, free of other charges than the consideration embraced in this contract, providing the properly authorized officers of the Express Company make application in writing for passes for such Messengers or Agents." He was in fact riding on a free pass in handling Express and Baggage as employee and agent of the Express Company. But there is nothing in the point raised, for being rightfully on the Express car it is immaterial what the technical relation was, so far as the Demurrer was concerned.

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II.

At pages 6 to 9 inclusive of the Application of Plaintiff in Error for a Re-hearing, Counsel again go over the same argument contained in their Reply Brief to the effect that because Adams was led to state as a mere conclusion that West was Joint employee there was an issue made on that point. We make the same answer as previously made, that a mere conclusion would not make an issue; that the cross-examination of the witness annulled the conclusion by showing that West received all his pay from the Express Com-

pany and that the Railroad Company paid the Express Company, and that under the Answer of Plaintiff in Error, no such issue could be made without amendment. The conclusion of the witness Adams being insufficient and annulled by the cross-examination there was absolutely no evidence in the case that West was an Employee of the Railroad, and if there had been it was covered by the general verdict.

III.

At pages 10 to 18½ of the Application of Plaintiff in Error for a Re-hearing, Counsel for Plaintiff in Error practically repeat the assertions of their Reply Brief. We, therefore, repeat that there is absolutely no foundation in the Record to support an assertion that the case was tried in the lower Court on the theory that West was an employee of the Railroad, or that the Court so understood it, or that Counsel, or any one, so conceded. If it was conceded, why was Plaintiff in Error trying to prove it by Adams, and by getting in the Circular, ruled out under objections of Defendant in Error? Why was Defendant in Error so strenuously objecting, and why should the lower Court so assume when Defendant objected to such offer? To the offer of Counsel for Plaintiff in Error to show that West was an employee of the Railroad, Counsel for Defendant in Error objected as follows: "Further than the matters offered to be shown are admitted by the pleadings, we object to the offer as incompetent, irrelevant and immaterial." See Original Record page 176. The express allegation in the Answer of Plaintiff in Error, upon this point removes all doubt and makes argument useless.

See last two paragraphs on page 11 of the Abstract of the
410 Record, where after admitting the allegations of the Petition in that respect Plaintiff in Error says—"and defendant Railroad Company states, that said William B. West, deceased in performing said duties in handling said baggage was doing so under and by virtue of his said employment by the said American Express Company." Furthermore every fact proven at the trial going to the employment of West shows that he was employed by the Express Company and not by the Railroad Company. His contract of employment was with the American Express Company. He received all his pay from the American Express Company. He served directly under Mr. Bird, Superintendent for the Express Company and it is not claimed that the Railroad Company had anything to do with hiring or discharging him.

At the bottom of page 15 of the Application for Re-hearing, Counsel again take up the argument that because Defendant in Error pleaded both Sections of the Kansas Statutes which render waivers void, and one of which related to employees, that therefore it could be assumed that it was conceded that West was an employee of the Railroad: But why then, would Defendant in Error plead the Section that did not relate to Employees? Both were pleaded because the Kansas Decisions generally refer to both, they being the same on principal; and if, at the trial, through an amendment of the Pleadings an issue had arisen as to whether West was an employee of the Railroad, the pretended waivers would have still been

void under this second Section. We hardly understand the statements of Counsel at page 18½, as to the matter discussed being a new point, as it was argued at length by Defendant in Error in her original Brief. See pages 2, 3 and 33 to 38 inclusive.

At page 24 of the Application for Re-hearing, Counsel for Plaintiff in Error sets out a paper which they mark "Exhibit A" and which they say is a copy of the Contract referred to in Exhibits "A," "B" and "C" and which they would have offered later in evidence at the trial if the other papers referred to had been admitted. If this is the proper time to present this paper, we suppose it is proper to object to it as incompetent, irrelevant and immaterial and not admissible under the pleadings, and on the ground that it

411 shows on its face that it is not a contract referred to in the Exhibits referred to. However, this paper shows conclusively that it contains no waiver of a right of action as claimed for the three Exhibits offered, and shows conclusively that Express Messengers are employees of the Express Company, and not of the Railroad, and fully bears out the legal presumption that not having been offered at the trial it will be presumed to be fatal to the contention of Plaintiff in Error. Instead of showing a waiver of a right of action against the Railroad, the Railroad recognizes in this paper its liability and provides that the Express Company must in part reimburse it in case of accident. See Article XI, page 6 of the paper referred to by Counsel. Again Article 11, page 2 expressly establishes that West would be deemed solely an employee of the Express Company. But this paper could not have been allowed in evidence had it been pleaded and offered, for it does not contain any of the provisions provided for in said Exhibits "A," "B" and "C" and clearly would only be admissible as a part of them. See Brief of Defendant in Error, pages 55 and 56. Furthermore, if offered at all, it must have been offered at the same time, and as a part of those Exhibits. It could not have been offered later and separately as Counsel now pretend they would have done. The objection of Defendant to the Exhibits "A," "B" and "C" fully covers these points. See pages 10 and 11 Brief of Defendant. But this paper is not in evidence nor was it offered, but it goes to show the extreme weakness of the Argument of Plaintiff in Error, they themselves having interposed it here. The paper contains nothing with respect to any employment of West by the Railroad, or anything with respect to the manner or amount which the Railroad was to contribute to the Express Company for the services of the Express Messenger in handling the personal baggage. If West had been an employee of the Railroad it would have been very easy for the Railroad Company to have produced its books and pay-roll and by amending its answer have so proven, without resorting to recitals in circulars sent out by the Express Company.

IV.

The foregoing also answers, the statements of Plaintiff in Error at pages 19 to 26 of its Application for Re-hearing, there being nothing additional to the argument in the previous Briefs presented.

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IV.

At page 27 of the Application for Re-hearing, Counsel refer to the Decision of the Supreme Court of May 13th, '12, as decisive. This case is no more in point, and goes no further than the other Federal cases considered in the Briefs, and West not being an employee of the Railroad has nothing to do with this case. It merely holds that the action having been brought in the Federal Court under the Federal Act must be brought by the Personal Representative and that a State Employers' Liability Act which was in conflict in many material respects would not be allowed to be invoked in the Federal Court. And see Typewritten Brief of Defendant in Error, pages 9 to 12.

VI. & VII.

These Divisions of the Application for a Re-hearing are fully covered by the Original Brief and Typewritten Brief of Defendant in Error.

Plaintiff in Error, at the bottom of page 8 says, that the Exhibits "A," "B" and "C" which they offered as waivers, were not proven by Defendant in Error to be Kansas Contract. Each of these Exhibits shows on its face that it is a Kansas Contract, at least prima facie, and no proof was necessary. See pages 6, 7 and 8 Counter Abstract of Defendant in Error. See also the Exhibits as set out in the pleadings and Original Record. Exhibit "A" on its face is dated "Dated Parsons, State of Kansas, the 9th, day of January 1893" Exhibits "B"—"Dated, Parsons, State of Kansas, the 15th day of October 1896," and Exhibit "C"—"Dated at Parsons, State of Kansas, the 18th, day of October 1893."

This Court did not assume, as stated on page 9 of the petition, that West was riding on a free pass, (although he was). It recognizes, what the pleadings show, that West was rightfully in the Express car as Express Messenger at the time of his death.

413 There appears to be nothing new, or of merit, in the Application of Plaintiff in Error, for a Re-hearing. The Opinion, as prepared by this Court is complete and clear, and no purpose can be served by a Re-hearing.

Respectfully Submitted,

CHARLES H. TAYLOR AND
S. GRANT HARRIS,
Of Counsel for Defendant in Error.

[Endorsed:] 1928. M. K. & T. vs. West. Filed Jul- 8, 1912.
W. H. L. Campbell, Clerk.

414 Supreme Court, September Term, 1912, October 22nd, 1912,
Eighteenth Judicial Day.

And thereafter to-wit, on the 22nd day of October, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

M., K. & T. R. Co., Plaintiff in Error,
vs.
IVOLUE B. WEST, Defendant in Error.

And now on this day it is ordered by the court that the above cause be set for oral argument on petition for rehearing.

415 Filed Dec. 4, 1912. W. H. L. Campbell, Clerk.

In the Supreme Court of Oklahoma.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
IVOLUE B. WEST, Defendant in Error.

Supplemental Answer to Application for Rehearing.

1.

There is nothing in the point of Plaintiff in Error, that the Complaint, to have shown a cause of action, must have alleged that West was an employee of the Railroad, or else, have alleged a contract between the Railroad and the Express Company showing that West was entitled to ride, or otherwise West would be deemed a trespasser. It was not necessary to allege the particular legal relation which West bore to the Railroad Company, (as whether he was an employee or a passenger,) when sufficient facts are alleged to show that the Railroad Company owed him the duty of care, or, in other words, that West was rightfully on the train at the time of his death. The Complaint, however, specifically alleges that West at the time of his death was the Express Messenger on the Express Car of the train of Defendant, and at the time was riding in the course of his duties as such under employment by the Express Company. Hence the Complaint shows that West at the time was rightfully on the train in the performance of his duties, and that so far as the Railroad was concerned that he was a Passenger. It was unnecessary to allege whether West himself or the Express Company was to pay for his transportation while acting as Express Messenger. It would be no more necessary to allege or set out the particular contract with respect to the payment of his transportation, than, (in a case where the Deceased was an ordinary Passenger,) it would be necessary to allege and set out the Railroad Ticket to show the particular contract with respect to the payment of transportation. In the case of an ordinary passenger, it would simply be necessary to allege that the Deceased entered upon the train as a Passenger and was riding in a passenger car of Defendant's train. This is sufficient to show prima facie a

right to be upon the train, and it will not be presumed that
416 he had no ticket or did not intend to pay his fare but was a
mere trespasser, all of which would be matter of defense as
against a general allegation showing prima facie that he was right-
fully upon the train. So, in the case at bar, when the Complaint
alleges that West at the time of his death was Express Messenger, and
as such riding in the Express Car on Defendant's train pursuant
to the duties of his employment by the American Express Company,
a "prima facie" right to be upon the train is shown, and it will not
be presumed that neither he or the Express Company as his employer
would pay his fare and hence that he was a trespasser. It is a matter
of common knowledge, of which any Court will take Judicial notice
that an Express Messenger in charge of an Express Car on a train, is
rightfully upon the train, at least prima facie. If there was no con-
tract between the Express Company and the Railroad Company or
between the Express Messenger and the Railroad Company, with re-
spect to transportation, the Express Messenger would no more be pre-
sumed to be a trespasser than a passenger who entered a train with-
out a ticket would be. In either case (the facts showing prima facie
that they are rightfully on the train) an implied contract arises as
to payment of transportation upon which the Railroad could recover,
and if in either case there was still a claim that they were trespassers
it would be a matter of defense as against the general allegations
showing a prima facie right to be upon the train. If Plaintiff in
Error had desired to have the allegations of the Petition relating to
the right of the Deceased to be upon the train made more specific, a
motion to make them more definite and certain in that respect could
have been made. But, it is clear, that a mere General Demurrer
would not avail in such case, for it is elementary that a general de-
murrer would not reach to indefiniteness, uncertainty or ambiguity,
but only could be availed of in case there had been an entire omission
of any allegation showing that West was the Express Messenger and
upon the train in the course of his duties at the time of his death.
It is not even material so far as the right to recover in this case is
concerned, whether there was any specific contract between the Ex-
press Company and the Railroad Company with respect to the trans-
portation of West, the Express Messenger, so long as the allegations
show that he was on the Express Car pursuant to duties which re-
quired him to be there, for if there was no contract, the Rail-
417 road Company, as before said, could recover for his transpor-
tation as upon an implied contract. In the case of a person
entering a passenger car, without any ticket and without paying
fare and who is killed by negligence of the Railroad before any fare
has in fact been paid, a right of action unquestionably lies for the
death, for such right does not depend upon a ticket or other specific
contract, but upon the right, prima facie, to be upon the train. If
such right existed the duty of the Railroad to exercise care existed
whether a ticket has been purchased or a contract executed or not.
And if the petition alleges sufficient facts to show prima facie the
right of the Deceased to be upon the train, any claim that he was in
fact a trespasser would be purely a matter of defense. Hence it is

only necessary to allege in a Petition sufficient to show prima facie that the person killed or injured was riding at the time as an ordinary passenger or pursuant to duties requiring him to be lawfully there. The Complaint in the case at bar, specifically alleges that West was the Express Messenger and riding at the time pursuant to his duties as such under employment of the American Express Company. As between West and the Railroad Company, under these allegations, West was a passenger, and it is immaterial, so far as his right of action as shown by the pleadings is concerned, whether he paid or was to pay his own fare or whether his employer, the Express Company, paid or was to pay it, or whether the Railroad Company had agreed with the Express Company to transport him free or in part consideration of his handling the personal baggage, as appears from the Contract attached to the petition for re-hearing. The particular method of paying for West's transportation is merely detail unnecessary in the complaint, and which (even if proper) Plaintiff in Error should have sought by motion to make more definite and certain in that respect. Plaintiff in Error made no such motion, nor did it pretend that its general demurrer raised a question as to West's right to be upon the train, for it joined issue and by Answer specifically alleged as follows:—"Further answering, Defendant states that at the time of the alleged injury in question the deceased was in the Express car referred to in Plaintiff's Petition, being transported by this defendant over its said line of railroad from points in the State of Kansas, etc., * * * and was in said car in pursuance of said contract hereinbefore referred to as Exhibit "B", etc., * * *. Further answering, defendant admits that at and prior to the death of said William B. West, deceased, he was employed by the American Express Company as Express Messenger upon the Express Cars operated by Defendant Railway Company over its line of railroad between the city of Parsons, Kansas, through the State of Oklahoma to points in the State of Texas, and admits that the deceased, William B. West, in addition to his employment as express messenger by said American Express Company, was also engaged in handling passenger baggage upon the Express car of the said Defendant Railway Company, and Defendant Railway Company states, that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by said American Express Company, and that such handling of such baggage by said West was for and in behalf of and under the direction of said railway company." Nothing could be plainer than these allegations of the Answer in showing that as between West and the Railroad Company, West was a passenger and that West at the time, was rightfully on the Express car, pursuant to his duties of employment by the Express Company, and (as alleged in the Answer at least) "under the direction of the railway company, although the employment was under the Express Company. If there had been any omission or indefiniteness in the Complaint (which there was not), the Answer fully supplies them. Under the allegations of both the Complaint and the Answer, West was rightfully on the train and the Railroad

owed him the duty of care as against head end collisions. There is no question of assumption of Risk involved in this case, nor could there have been under the facts and the Constitution, even had West been an employee of the Railroad.

It is also perfectly plain that there is nothing, either in the Petition or the Answer to indicate that West was employed by the Railroad, but exactly the contrary appears. See Third Amended Answer. It is folly for Plaintiff in Error, now, to assert that the Pleadings show that the case was tried in the Lower Court on the theory that West was an employee of the Railroad. Under its Answer, which was never amended, and which expressly states that West was handling the personal baggage under and by virtue of his employment by the Express Company, Plaintiff in Error is absolutely estopped to make exactly the opposite claim in this Court, under the very rule it pretends to invoke, viz., that a party cannot go into the lower Court on one theory and claim the opposite on Appeal.

This rule, which Plaintiff in Error pretends to invoke, is also wholly inapplicable as against Defendant in Error for the further reason that not one single instance in the Record shows, or even indicates, that Defendant in Error was trying the case in the lower Court on the theory that West was an employee of the Railroad. On the contrary, the Complaint specifically states that he was riding at the time of his death in the Express Car as Express Messenger under employment of the American Express Company; and whenever Plaintiff in Error, at the trial, sought to show that West was also an employee of the Railroad, such evidence was met with an objection by Defendant in Error. Plaintiff in Error tried, in direct opposition to its own Pleading, to show by Adams, and by a recital in a printed Circular, that West was an employee of the Railroad. Both attempts were met by strenuous objection on the part of Defendant in Error, and the Circular, under such objection, was ruled out. This certainly does not look as though the case was tried in the lower Court by either Party or by the Court on any theory that West was an employee of the Railroad.

Furthermore, even if Counsel for Plaintiff in Error, (with their own Answer staring them in the face) had in fact, erroneously believed the case was being tried on the theory that West was an employee of the Railroad, or even if the lower Court made a ruling on such a theory, such fact, even if it existed, would not bring the case within the Rule attempted to be invoked by Plaintiff in Error, for the Rule referred to, only applies where the Record shows unequivocally and beyond dispute that all parties, and the Court mutually proceeded throughout the trial on that theory.

Exactly the contrary is shown by the Record in this case. Counsel for Plaintiff in Error not only attempted to make proof by testimony, (of Adams), and by offering a Circular containing a recital to the effect that West was an employee of the Railroad, but on two occasions, at least, expressly stated that they proposed to make such proof. If it was conceded by all parties, then why these successive attempts on the part of Plaintiff in Error to get in such proof. And why was all testimony offered by Plaintiff

in Error in an attempt to show that West was an employee of the Railroad objected to by Defendant in Error.

At page 176 Original Record, Counsel for Plaintiff in Error intimated that they would attempt such proof. Defendant in Error at once objected in the following words: "Further than the matters offered to be shown are admitted by the Pleadings, we object to the offer as incompetent, irrelevant and immaterial."

And in connection with the attempt of Plaintiff in Error to prove by Mr. Adams that West was under employment of the Railroad Company with reference to the handling of the personal baggage, Counsel for Defendant in Error continually objected, as follows:— (See Record pages 172 & 173.)

Mr. ALLEN: "Q. At that time (death of West) do you know what relation existed between Mr. West and the M., K. & T. Railroad Company, with reference to handling baggage of that Company? A. Yes Sir. Q. What was that relation, Mr. Adams? Mr. TAYLOR: I would like to ask first if there was anything in writing, any written agreement. By the COURT: Don't you plead Mr. Taylor, he also handled passenger baggage? Mr. TAYLOR: Yes Sir, we plead it. Mr. ALLEN: We expect to go further by this witness. By the COURT: All right, go ahead and ask the question. Mr. TAYLOR: Is there a written Contract regarding it? WITNESS: I don't exactly understand what you refer to as a written contract. Mr. TAYLOR: He asked you what the relation was between the two, and I want to know if it was expressed by any written agreement? A. I couldn't say that there was."

(It will be observed by this Court, that Plaintiff in Error failed to produce the written Contract, which Counsel for Defendant in Error were seeking, although they have now attached it to their petition for a rehearing in this Court. The reason why it was not produced appears when it is seen that the Contract shows that West was not an employee of the Railroad but of the Express Company, and that the Railroad Company agreed to transport him. The criticism of this Court in its Decision is hardly applicable to Counsel for Defendant in Error, the record showing that they were attempting to disclose such a Contract if there was one.)

421 "Mr. ALLEN: Q. Now what was that relation, Mr. Adams? Mr. TAYLOR: That is objected to, as incompetent, irrelevant and immaterial. By the COURT: Objection overruled. Mr. TAYLOR: The Plaintiff excepts. A. Well, he was a joint messenger and baggageman. Q. By joint you mean joint with the M., K. & T. and the Express Company? A. Worked for both companies, yes sir. Q. Do you know what proportion of his salary was paid by those companies, or whether it was paid in any proportion? A. Equal division. By Mr. TAYLOR: Was this in writing, any of it relating to the salary as between the Railroad Company and the Express Company; if it is in writing this is not the best evidence? Mr. RALLS: We offer this for the purpose of showing that the deceased was a joint employee of the American Express Company and the M., K. & T. Railroad Company, while he was running on the line. Mr. TAYLOR: If this agreement was in writing, it is the best evidence.

I don't see why we are bound by any agreement between these companies. By the COURT: If the agreement was not in writing he can answer the question. Mr. TAYLOR: The Plaintiff excepts."

(It will be seen that even the testimony of Adams was admitted by the Court on the understanding that there was no written contract between the Companies regarding it, and that Counsel for Plaintiff in Error proceeded under the objection without disclosing it.)

The continual fight of Counsel for Defendant in Error, to keep out the testimony of Adams, after Counsel for Plaintiff in Error announced that it offered for the purpose of showing that West was an employee of the Railroad, certainly does not show that this was conceded by all parties at the trial and that the case was being tried by all parties on the theory that West was an employee of the Railroad. As a matter of fact, Adams' mere conclusion of law with respect to the matter, was wholly annulled on his cross-examination. See Briefs of Defendant in Error already submitted. Record pages 177-178.

Counsel for Plaintiff in Error pretend to make much of the lower Court's question—"Don't you plead Mr. Taylor, he also handled passenger baggage?" And the Answer—"Yes Sir, we plead it." as indicating that the Court at that time thought it was conceded that West was also an employ  of the Railroad. The Question and Answer can bear no such construction, and if the Court had such thought when the question was asked, its mistake must have been at once perceived by the fight of Defendant in Error immediately following and continuing throughout the trial to keep out such proof.

Later, (Original Record pgs. 172-175) Counsel for Plaintiff in Error attempted to introduce in connection with the testimony of Adams, a printed Circular containing a recital to the effect that Express Messengers were also employees of the Railroad, as follows:—Mr. ALLEN: "Q. It (the Circular) is directed to joint Messengers and Baggage-men; it appears to be on the M., K. & T. line, that means joint messengers of what? A. Joint messengers, we call or term these men messengers, and the railroad baggage-men, and the word joint signifies they worked for both companies. Q. Does that include the position which Mr. West occupied? A. Yes Sir. Mr. TAYLOR: That is objected to as calling for a conclusion and incompetent, irrelevant and immaterial, and we ask that it be stricken out. By the COURT: Objection sustained; the answer will be stricken out."

Counsel for Plaintiff in Error then offered a copy of the printed Circular, in an attempt to get in evidence, the recital that West was an employee of the Railroad. Counsel for Defendant in Error objected as follows:—(Record pg. 175.) "Mr. TAYLOR: It is objected to, on the ground that it is incompetent, irrelevant and immaterial and not the best evidence and that the recitals therein contained are not shown to have ever been brought to the attention of the deceased in this action, and that the recitals themselves have no support in the evidence to sustain them."

The Lower Court ruled out the Circular, and in so doing stated that

even if brought to the attention of deceased, the Circular would amount merely to an attempt to prove a conversation with a deceased person. Record p. 176. The foregoing, does not look very much as though the Court or either Counsel were trying the case on the theory that West was an employee of the Railroad.

Counsel for Plaintiff in Error now pretend to Complain that they were not allowed to make proof that West was an employee of the Railroad. The only evidence actually offered by them, however, was the testimony of Adams which was admitted by the Court over the objections of Defendant in Error, and the Circular which was excluded. It will be observed, however, that the Circular was not excluded on the ground that Plaintiff in Error would not be per-

mitted to prove that West was an employee of the Railroad, 423 but that the Circular containing the recital was not admissible or the proper method of making such proof. However, no such proof could have been properly allowed without an amendment of the Answer.

The fact that the Circular was inadmissible and was ruled out, together with the fact that the cross-examination of Adams showed that the railroad paid the Express Company for the services of West in handling the personal baggage, hence annulling the mere conclusion given on direct examination, together with the express allegations in the Answer of Plaintiff in Error (which were never withdrawn or amended) that West was handling the personal baggage under and by virtue of his employment by the Express Company, leaves the case absolutely without any issue to go to the Jury as to that matter. The pleadings of Plaintiff in Error alone, estop it from complaining on any point relating to that matter.

Furthermore, it is shown affirmatively, and beyond any question, by the testimony of Adams himself, and of Bird, (both witnesses of Plaintiff in Error), and even by the Contract, not offered in evidence at the trial, but which Plaintiff in Error has voluntarily attached to its petition for re-hearing, and which therefore can be referred to against it, that West was employed only by the Express Company, was paid by the Express Company, worked under direction of Bird, Superintendent of the Express Company, and that the Railroad Company paid the Express Company for his services with respect to the personal baggage. This proof is all undisputed and in strict accordance with the allegations of both Plaintiff and Defendant. The fact that West was known as joint Express Messenger and Baggage-man, relates only to the work he did under his employment by the Express Company and in no way to his technical legal relationship, which is determined by other principles than recitals in a printed Circular, or what he was called by the train-men.

Hence, neither under the Pleadings nor under the evidence was there any issue as to West being an employee of the Railroad for the Jury to determine. Even the Contract attached by Plaintiff in Error to the petition for re-hearing, shows that the Railroad agreed with the Express Company to transport West, and hence that he was a passenger.

424 Plaintiff in Error again claims in the Petition for re-hearing, that the setting up by Defendant in Error, in her Reply to the Third Amended Answer, of both Sections of the Kansas Statutes relating to "Contracts waiving Liability," one of which Sections relates to employees of railroad-, said with equally as much force, that the setting up of the other Section which does not relate to employees, was denial that West was an employee of the Railroad. At all events, the setting up of both Sections together can hardly be said to indicate anything as to the matter which was not an issue; certainly not, that the case was tried by all parties on the theory that West was an employee of the Railroad.

The Pleadings of both Plaintiff and Defendant and all the evidence shows affirmatively and beyond worthy dispute that West was employed only by the Express Company. The truth and fact is that he was only employed by the Express Company. No evidence, documentary or otherwise that would constitute legal evidence, was offered or could be offered which would show that West was at the time of his death under the employ of anyone but the Express Company, for he was not. Any claim that West was an employee of the Railroad Company, in the legal sense, has no foundation in fact or in the Record in this case or in anything that was or could have been offered as legal evidence. This covers the merits of the case. But there is not even a technicality upon which Plaintiff in Error can base a defense in this action, and none has been pointed out. Furthermore, if there had appeared in the Record, what might be termed technical error, (and none has appeared) the Statutes of Oklahoma "require the Supreme Court to disregard any error or defect in the Pleadings or Proceedings which does not affect the substantial rights of the adverse party." See 27 Okl. 719.

West, not being an employee of the Railroad, the question as to whether this action should have been brought as it was or under the Federal Employer's Liability Act is not properly before this Court in this case.

It is not claimed that the foregoing 10 pages any more than enlarge upon what has already been presented to this Court in the previous printed and type-written Briefs of Defendant in Error. We therefore refer the Court to our Original printed Brief and to the typewritten Brief allowed to be presented after the oral argument, and to the typewritten Brief heretofore interposed in answer to this Petition for re-hearing.

425 The unanimous Decision of this Court, as handed down in this case, covers the case, and all points raised by the Petition. Two lengthy printed Briefs and two supplementary Type-written Briefs, including the Petition have already been submitted by Plaintiff in Error in addition to two oral arguments, and it is obvious that nothing of merit could be added by either party on a re-hearing of the case.

Such Application in justice should be denied.

Respectfully submitted,

CHARLES H. TAYLOR AND
S. GRANT HARRIS,
Attorneys for Defendant in Error.

426 Supreme Court, December Term, 1912, December 4th, 1912,
Second Judicial Day.

And thereafter to-wit, on the 4th day of December, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

M., K. & T. RY. Co., Plaintiff in Error,

vs.

IVOLUE B. WEST, Defendant in Error.

And now on this day it is ordered by the court that defendant in error be allowed to file supplementary answer, and the cause is continued till December 5 1912.

427 Supreme Court, December Term, 1912, December 5th, 1912,
Third Judicial Day.

And thereafter to-wit, on the 5th day of December, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

M., K. & T. RY. Co., Plaintiff in Error,

vs.

IVOLUE B. WEST, Defendant in Error.

And now on this day the above cause is argued orally, and the cause is submitted on the record, briefs and oral argument.

428 In the Supreme Court, December Term, 1912, December 5th,
1912, Third Judicial Day.

And thereafter to-wit, on the 5th day of December, 1912, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

M., K. & T. RY. Co., Plaintiff in Error,

vs.

IVOLUE B. WEST, Defendant in Error.

And now on this day it is ordered by the court that defendant in error be allowed 20 days to file brief, and plaintiff in error 20 days to file reply brief.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
 VS.
 IVOLE B. WEST, Defendant in Error.

Motion of Plaintiff in Error for Extension of Time to File Brief.

Comes now, W. R. Allen, one of the attorneys of record for the plaintiff in error, and respectfully moves this honorable court for ten days' extension of the time heretofore granted within which to file its brief on behalf of plaintiff in error in reply to the brief of the defendant in error on petition for rehearing and as grounds for said motion respectfully shows that he was called to Kentucky on account of the illness of his mother and remained there during a portion of the time allowed by the court within which to file said brief; that said brief is now in course of preparation but that he has not had an opportunity to complete same since his return.

CLIFFORD L. JACKSON,
 W. R. ALLEN,
Attorneys for Plaintiff in Error.

Endorsed: No. 1928.—In the Supreme Court of the State of Oklahoma. M., K. & T. Ry. Co., Plaintiff in Error, vs. Ivolue B. West, Defendant in Error.—Motion of Plaintiff in Error for Extension of Time to file Brief.—Filed Jan. 14, 1913. W. H. L. Campbell, Clerk.

430 Supreme Court, December Term, 1912, January 14th, 1913,
 Sixteenth Judicial Day.

And thereafter to-wit, on the 14th day of January, 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

M., K. & T. Ry. Co., Plaintiff in Error,
 VS.
 IVOLE B. WEST, Defendant in Error.

And now on this day it is ordered by the court that plaintiff in error be allowed 10 days' additional time within which to file reply brief.

431 Supreme Court, December Term, 1912, February 4th, 1913,
Twentieth Judicial Day.

And thereafter to-wit, on the 4th day of February, 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

M., K. & T. Ry. Co., Plaintiff in Error,

vs.

IVOLUE B. WEST, Defendant in Error.

And now on this day it is ordered by the court that the petition for a rehearing filed herein be, and the same is hereby granted.

432 Supreme Court, June Term, 1913, June 11th, 1913, Second
Judicial Day.

And thereafter to-wit, on the 11th day of June, 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

M., K. & T. Ry. Co., Plaintiff in Error,

vs.

IVOLUE B. WEST, Defendant in Error.

And now on this day the above cause is argued orally on rehearing, and the cause is submitted, and it is ordered by the court that defendant in error be allowed to file additional copies of brief.

433 Supreme Court, June Term, 1913, August 6th, 1913, —
Judicial Day.

And thereafter to-wit, on the 6th day of August, 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

No. 1928.

M., K. & T. Ry. Co., Plaintiff in Error,

vs.

IVOLUE B. WEST, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record, briefs, petition for rehearing and oral argument.

And the court having considered the same finds that the judgment of the court below in the above cause should be affirmed,

It is therefore ordered and adjudged by the court that the judgment of the court below in the above cause, be, and the same is hereby affirmed. Opinion by Kane, J.

All the Justices concur, except Dunn, J., absent.

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(Filed Aug. 6, 1913.)

In the Supreme Court of the State of Oklahoma.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.

IVOLUE B. WEST, Defendant in Error.

1. In an action brought by a widow under a state statute against a railway company for damages for injury suffered by her husband which resulted in his death, the petition alleged that the deceased was employed by the American Express Company as an express messenger; that in addition to his duties as an express messenger, he handled the personal baggage of the inter- and intra-state passengers of the railway company which was engaged in interstate commerce. The answer of the defendant admitted the foregoing allegations and further alleged that the deceased "in performing said duties in handling said baggage was doing so under and by virtue of his said employment by the said American Express Company." Held, That the pleadings disclose that the deceased, a resident of the State of Kansas, suffered the injuries which resulted in his death while he was employed by the American Express Company as an express messenger and not while he was employed by the railway company in interstate commerce, and that the action was properly brought by the widow under the state law.

2. Evidence on the question of employment examined and held not to be in conflict with the allegations contained in the petition, the admissions of the answer or the evidence of the plaintiff to the same effect. That said evidence, construed as a whole and in connection with the pleadings, merely supplements the admissions of fact contained in the pleadings by disclosing that the deceased received his entire salary for all the work performed by him from the express company; and that he was rightfully upon the train of the railway company by virtue of an arrangement between the two companies whereby in consideration of the work performed for the express company in handling baggage, the railway company agreed to pay to the express company one-half the sum so paid.

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3. An express messenger, employed and paid solely by an express company and entitled under an arrangement between the express company and a railway company to ride on the trains of the railroad company in discharge of his duties, is a passenger

while on such train in the discharge of his duties and entitled to the same degree of protection.

4. The contracts of employment containing waiver clauses offered in evidence by the defendant were properly excluded: (1) Because it was not clearly shown that the contracts covered the employment in which the decedent was engaged at the time of his death; (2) The waiver clauses are void under the laws of the State of Kansas where said contracts were executed; (3) The waiver clauses are void under Sections 7 and 8, Article 23, Williams' Const., which provide:

"Sec. 7. The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

"Sec. 8. Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void."

5. By Sec. 2907, Comp. Laws, Okla. 1909, the measure of damages for the breach of an obligation not arising from contract is the amount which will compensate for all the detriment proximately caused thereby.

6. The court gave the following instruction: "If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and in determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what would probably have been his lifetime, if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition." Held, not error.

7. The court below refused to give the following instruction: "If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained, and you are not to permit your sympathy to influence your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish. Your verdict must be based upon the financial loss in dollars and cents." Held, not error.

8. In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct, both in form and in substance, and such that the court might give to the jury without modification or omission. If the instruction as requested is objectionable in any respect its refusal is not error.

9. The amount of damages recoverable in actions for death by wrongful act is peculiarly a question for the jury; and the general rule is, that the verdict of the jury will not be reversed on the ground that the damages are excessive, unless the damages are so large as under the circumstances to shock the sense of justice or to indicate that they were the result of prejudice and passion on the part of the jury.

10. The instructions given by the court below correctly confined the amount of recovery to the pecuniary loss sus-

tained by the widow and children of the deceased. In our judgment, there is sufficient evidence in the record to sustain the verdict of the jury under the most limited interpretation that can be placed upon the instruction given.

(Syllabus by the Court.)

Appeal from the District Court of Muskogee County.

John H. King, Trial Judge.

Affirmed on Re-hearing.

Clifford L. Jackson, W. R. Allen, (M. D. Green on brief), Attorneys for Plaintiff in Error.

Chas. H. Taylor, S. Grant Harris, (St. Paul, Minn.), (Benj. Martin and Jno. D. O'Brien on brief), Attorneys for Defendant in Error.

Opinion of the Court by

KANE, J.: This was an action for damages for personal injuries resulting in death, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. The deceased was the husband of the plaintiff and the injury which resulted in his death was occasioned by a collision between passenger train No. 5, commonly called the "Katy Flyer" and freight train No. 34.

437 The primary cause of the collision was the violation of a dispatcher's train order by train No. 34, whereby the freight train, which was northbound, departed from the yards at Muskogee ahead of time and on the time of the southbound passenger train with which it collided. The collision occurred on the main line of the Missouri, Kansas & Texas Railway Company in Oklahoma, at a point between two and three miles north of Muskogee and just south of the Arkansas River. There was no dispute as to the collision, the cause of it, or that it resulted in the death of Mr. West, the husband of the plaintiff. The deceased and the plaintiff were residents of the State of Kansas. No personal representative was appointed and this action was commenced by the widow in her own name for the benefit of herself and four minor children, the fruit of her marriage with the deceased, under a state statute which provides for such actions. It is alleged in the petition that "at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by said defendant company over its said line of railroad between said city of Parsons, Kansas through the State of Oklahoma to points beyond in the State of Texas; that in addition to his duties and employment as express messenger, as aforesaid, said William B. West also engaged in handling passenger baggage upon the express cars of said defendant company." The answer of the defendant was, (1) a general denial; (2) that even if the deceased was injured and killed at the

time and place and in the manner alleged in the petition, that his injuries and death were not due to any negligence on the part of the defendant; and (3) that the defendant is a common carrier engaged in commerce between the several states; that the passenger train described by plaintiff in said petition as the "Katy Flyer" was at all times mentioned therein an interstate train, engaged in the movement of interstate commerce, and that said freight train, starting from Muskogee in the State of Oklahoma and proceeding
 438 on its line of railway to Parsons, in the State of Kansas, was at all times mentioned in plaintiff's petition, engaged in moving interstate commerce.

The three succeeding paragraphs of the answer referred to three separate contracts of employment, which it is alleged were made and entered into by and between the deceased and the American Express Company, the first two being executed in 1893, and the third in 1896. It is then alleged in effect that by the terms of said contracts, it is provided that in consideration of the premises and of the employment of the deceased by the express company, he was to assume all risk of accident and injury which he should meet with or sustain in the course of his employment whether occasioned or resulting by or from the gross or other negligence of the railway company upon whose lines his duties were to be performed, and whether resulting in his death or otherwise. That in case of any injury suffered by deceased, he would at once, without demand, and at his own expense, execute and deliver to the corporation or person owning or operating the railroad, stage or steamboat line upon which he should be so injured, a good and sufficient release under his hand and seal of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom, etc. The answer closes with the following averment:

"Further answering, defendant admits that at and prior to the death of the said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of railroad between the City of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas, and admits that the deceased, William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express cars of the said defendant railway company, and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by the said American Express Company, and that such handling of such baggage by said West was for and in behalf of and under the direction of said railway company."

439 The reply in effect denied each and every allegation in the answer contained, save as in the petition stated, or as hereinafter admitted, stated or qualified, and alleged that if the instruments mentioned in the answer were ever signed by William B. West, they were so signed and entered into in the State of Kansas during the years 1893 and 1896, and that by virtue of the laws of

the State of Kansas, and for want of consideration said pretended contracts, or the evidence thereof purporting to exist in Exhibits A and B attached to the answer of the defendant were and are wholly void and of no effect. To this reply the defendant filed a general denial. Upon the issues thus joined, the cause was tried to a jury which returned a verdict in favor of the plaintiff in the sum of \$15,000, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

By a former opinion of this Court, the judgment of the court below was affirmed, and the cause is now before us upon rehearing. The cause was ably and fully briefed and argued orally upon the original submission and again upon rehearing by counsel for both sides. After a careful re-examination of the record and briefs and the points presented by counsel in their oral arguments, we are still of the opinion that the conclusion formerly reached is correct. The assignments of error may all be grouped under the following heads: (1) The defendant in error herein is not the proper party to maintain this action; (2) Error of the court below in giving certain instructions, and refusing to give certain instructions which presented the same issue in another way; (3) The trial court erred in declining to admit in evidence the three written contracts attached to the answer pertaining to the employment of the deceased by the express company; (4) The amount of damages awarded is excessive.

440 The first assignment is based upon the theory that the pleadings and evidence show that the deceased suffered the injury which resulted in his death while he was employed by the railway company in commerce between the states within the meaning of the act of Congress relative to the liability of common carriers by railroad to their employes in certain cases, and therefore the cause of action accrued to the personal representative of the deceased for the benefit of the surviving widow and children. This contention cannot be sustained. It is specifically alleged in the petition that the deceased "was employed by the American Express Company as an express messenger." This is the only allegation to be found in the petition that attempts to state specifically by whom the deceased was employed, and there are no allegations elsewhere in the petition which necessarily negative that positive statement, or from which it may be reasonably inferred that the deceased was also employed by the railway company. But if the clear meaning of the specific allegation of the petition upon that point was clouded by the allegation which immediately follows it, to the effect that the deceased was also engaged in handling passenger baggage upon the express car of said defendant railway company, the answer of the defendant makes the situation entirely clear. In its answer the defendant, by way of admission, uses the language of the petition, "that at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of railroad between the city of Parsons, Kansas, through the state of Oklahoma, to points beyond in the state of Texas, and admits that the deceased,

William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express car of the said defendant railway company," and immediately adds, "and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by the said American Express Company."

441 The foregoing admissions are in entire harmony with the balance of the answer, which contains allegation after allegation positively stating that the deceased was employed by the express company continuously for a great many years prior to his death, and the contracts of employment between the express company and the deceased are attached to the answer and made a part thereof, and certain waivers contained therein are relied upon as a defense.

From the pleadings alone it is clear that the deceased suffered the injuries which resulted in his death while he was employed by the express company, and not while he was employed by the railway company; and that the parties did not attempt to join an issue of fact upon that question. Counsel for the railway company seem to base their contention on this point, solely upon the theory that the allegation to the effect that the deceased was also engaged in handling personal baggage in addition to his duties as express messenger is sufficient to create the presumption that he was jointly employed by the railway company, and cites *M., K. & T. Ry. Co. v. Reasor*, (Tex.) 68 S. W. 332; *Vary v. C., B. R. & M. Ry. Co.*, 42 Ia. 246, and *Oliver v. Northern Pac. Ry. Co.* 196 Fed. 432, as being authority to that effect. Those cases are so clearly distinguishable from the one at bar that we do not deem it necessary to notice them further than to say that in our judgment they are in no way in conflict with the conclusion herein reached. It is not disputed that the deceased handled interstate baggage, but the answer explains that in handling said baggage he was doing so under and by virtue of his said employment by said American Express Company. Moreover, there are no averments in the pleadings from which an inference may be reasonably drawn that any contract of employment was ever entered into between the deceased and the railway company.

The language of the act of Congress carries with it the idea and the essence of a contract. To be employed by one is to be engaged in his service, to be used as an agent or substitute in transacting his

442 business, to be commissioned and entrusted with the management of his affairs. In our judgment, the words, "while employed by such carrier," construed in connection with the context, is equivalent to "while hired by such carrier," which implies a request and a contract for compensation. The persons falling within the meaning of the act are those hired by the railway company, or those who are working for it at its request and under an agreement on its part to compensate them for their services. *U. S. v. Nourse*, Case No. 15901, 27 Fed. Cases; *McCluskey v. Cromwell*, 11 N. Y. 593; *Bingham, Executrix, v. Scott*, 177 Mass. 208. The case of *M., K. & T. Ry. Co. of Texas v. Blalack*, 147 S. W. 559, is directly

in point on the question now under consideration. In that case the railroad company pleaded that Blalack was in its employ at the time he was injured, but the only proof of employment was that Blalack handled baggage which was the work of an employé of the railway company. The court said:

"Where, in an action against a railroad company for negligent death, the evidence of plaintiff showed that decedent was an agent of an express company, employed and paid by it, and entitled to ride on the trains of the railroad company, under a contract between the two companies, and that he was killed through the negligence of the employés in charge of the train, the railroad company, engaged in interstate commerce, must show that plaintiff's claim was unfounded, and that decedent was in its employ, to avail itself of the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65—U. S. Comp. St. Supp. 1911, p. 1322—); and where it failed to do so, the state law will govern the right to recover."

On rehearing it is contended that the evidence adduced at the trial disclosed that the injury was suffered while the deceased was employed by the railway company and that, even if no issue of fact on the question of employment was joined by the pleadings, the case as to parties must be governed by the Employer's Liability Act. It is familiar law that if during the course of the trial it develops that the real case is not controlled by the state statute but by the federal statute, and the case is commenced under the former, the case pleaded is not proved and the case proved is not pleaded. *St. Louis & S. F. Ry. Co. v. Scales*, 33 U. S. 351. But in our judgment, that rule is not applicable here. The evidence of Mr. Adams, an officer of the express company, relied upon by counsel, is in no way inconsistent with the allegations of the petition and the admissions of the answer, to the effect that the deceased was employed by the express company at the time of his death. It is
443 true that Mr. Adams testified that the deceased "was a joint messenger and baggageman" and that "he worked for both companies," (which expressions under proper circumstances might be held sufficient to take the case to the jury on the question of employment. *Ry. Co. v. Reasor*, supra), but upon cross examination it was clearly shown that the witness merely drew erroneous conclusions from admitted facts and that his testimony as a whole supplemented the allegations of the petition and the admissions of the answer by more fully disclosing the relations existing between the express company and the deceased, and the express company and the railway company, and made it more clearly apparent that the decedent was rightfully on the train. Construing the allegations of the petition, the admissions contained in the answer, and the evidence of Mr. Adams together, a state of facts is disclosed almost identical with that in the *Blalack* case, supra. From a careful investigation of the entire record, we are persuaded that if we should reverse the judgment of the court below upon the ground that the deceased suffered the injuries which resulted in his death while he was employed by the railway company, we would compel the widow to abandon the tenable theory upon which she brought the case and to accept one

less advantageous to her and her children and one which it would be difficult, if not impossible, to establish.

We, therefore, find with the court below that the pleadings and the evidence conclusively show that the deceased suffered the injuries that resulted in his death while he was employed by the express company, and not while he was employed by the railway company in interstate commerce within the meaning of the federal Employer's Liability Act. It follows that under the issues joined and the evidence adduced the action was governed by Sections 5945 and 5948, Comp. Laws, Okla. 1909, as modified by Section 7, Art. 23, Williams' Constitution. The first of these sections provides for an action for injury resulting in death by wrongful act, which must inure to the widow and children, if any, or next of kin; the second, that
 444 where the residence of the party whose death has been caused, as set forth in Section 5945, is at the time of his death a resident of any other state or territory and no personal representative has been appointed, the action provided for in said section may be brought by the widow. And the constitutional provision provides that,

"The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

The second contention is predicated upon the following action of the court: The court instructed the jury as follows:

"If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss, sustained by the widow and children of the deceased, and in determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what would probably have been his lifetime, if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition."

The plaintiff in error requested the court to charge the jury as follows, which request was refused:

"If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained, and you are not to permit your sympathy to influence your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish. Your verdict must be based upon the financial loss in dollars and cents."

The principal ground of complaint as to the instruction given is that the term, "pecuniary loss," as used therein does not state with sufficient detail the specific elements of damage which the jury were permitted to take into consideration in assessing the amount of recovery. In our judgment, the instruction given is sufficiently clear to enable the jury to properly assess the damages, and is in accord with Sec. 2907, Comp. Laws, Okla. 1909, which provides that,

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate for all the detri-

ment approximately caused thereby, whether it could have been anticipated or not."

445 Where the instruction given reasonably and fairly presents the issue involved, the judgment of the court below will not be disturbed on appeal because a requested instruction which presented the same issue in another form was refused. Especially is this true when the instruction requested upon the same issue was less accurate in its statement of the law than the instruction given. The requested instruction was erroneous in several particulars. The first clause is misleading, for the reason that the statute upon which the action is based clearly provides and contemplates that the measure of damages shall be such amount as will fully compensate both the widow and the children, for whose benefit the action accrues. The first clause of the requested instruction is that the verdict of the jury should be for such an amount as would compensate the plaintiff for the actual loss sustained, and does not mention the children. The latter part of the instruction is also objectionable, for the reason it does not mention the right of the minor children to compensation for any pecuniary loss they may sustain in respect to the society of the father, as involved in the elements of fatherly care, advise and moral instruction and education. It is well settled that in order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct, both in form and in substance, and such that the court might give to the jury without modification or omission. If the instruction as requested is objectionable in any respect its refusal is not error. A party cannot complain that the court did not, of its own motion, modify and correct the request and then give it as corrected. No such duty rests upon the court. When a part only of a requested instruction is erroneous, the whole may properly be refused. *Blashfield on Instructions to Juries*, Sec. 137.

446 The third assignment of error arises out of the action of the court in refusing to admit in evidence the contracts of employment containing the waivers. We do not think the action of the court below in that regard was erroneous. In the first place it is not clear that the contracts offered cover the employment in which the deceased was engaged at the time of his death. That would be a sufficient ground for excluding them. It also appears that the contract were Kansas contracts. If we hold that they must be construed according to the laws of that State, we find that under the laws of Kansas, as construed by the highest court thereof, the waiver clause is held to be void. *Sewell v. A., T. & S. F. Ry. Co.* 78 Kan. 17. And if we hold that the contract is by its terms tied to the tort and the law of the place of the tort must govern (*Smith v. A., T. & S. F. Ry. Co.*, 194 Fed. 79), as the cause of action arose since statehood, we must hold the waiver clause void under Section 8, Article 23, Williams' Constitution which provides that, "Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void."

From an examination of the record, we are not prepared to say

that the verdict is excessive. The amount of damages recoverable in actions for death by wrongful act is peculiarly a question for the jury; and the general rule is that the verdict of the jury will not be reversed on the ground that the damages are excessive, unless the damages are so large as under the circumstances to shock the sense of justice or to indicate that they were the result of prejudice and passion on the part of the jury. 8 Am. & Eng. Enc. of Law, 2nd ed. p. 912, 932.

Section 2907, Comp. Laws, Okla. 1909, provides that,

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

447 The instruction given by the court below correctly confined the amount of recovery to the pecuniary loss sustained by the widow and children of the deceased. In our judgment, there is sufficient evidence in the record to sustain the verdict of the jury under the most limited interpretation than can be placed upon the instruction given.

The evidence is to the effect that deceased was 38 years of age, in good health of body and mind, with an earning capacity of \$83.33 per month at the time of his death; that his earning capacity steadily increased from the date of his employment by the express company to the time of his death, his salary having been advanced four times during that time. The evidence also showed that he was a man of good habits, industrious, ambitious, attentive to his family and that he contributed to the support of his wife and family all of his salary, except from three to five dollars per month which he retained for his personal expenses. His expectancy of life was admitted to be 29.62 years. The family consisted of a wife, two years younger than the deceased, and four minor children, one of whom was born after his death. Considering the education and clothing of the children and their increasing expense it may be reasonably inferred that each would fairly require its proportionate share of the earnings. There is evidence reasonably tending to show that the deceased would have apportioned among the members of his family a preponderating share of his salary. Upon the basis of an equal division, the widow and children would receive as their portion of his earnings the sum of \$24,682.14 during his expectancy. This computation does not take into account what might have been saved from the earnings of deceased during his lifetime and made to produce interest, nor any damage occasioned to the children on account of loss, of mental, moral or physical training or advice of the father. It was shown

448 that the cash earnings during the expectancy of the deceased at the rate proven would have reached approximately \$30,000. We think that in view of the large family entitled to support from those earnings, and the proven thrift, industry, frugality and advancement being made by the deceased at the time of his death, and his generous contributions to the support and maintenance of the wife and children, the verdict of the jury of \$15,000,

just one-half of the cash earnings of the deceased during his expectancy is not excessive. The following are a few of the cases where substantial verdicts under somewhat similar circumstances have been sustained:

Louisville Ry. Co. v. Shivells (Ky.) 18 S. W. 944;
 Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277;
 East Line, etc. Ry. Co. v. Smith, 65 Tex. 167;
 Reilly v. Brooklyn Heights R. Co. 65 N. Y. App. Div. 453;
 St. Louis, etc., Ry. Co. v. Cleere (Ark.) 88 S. W. 995;
 Chesapeake, etc. Ry. Co. v. Hendricks, 88 Tenn. 717;
 M., K. & T. Ry. Co. v. Williams, (Tex.) 117 S. W. 1043;
 Harris v. Puget Sound El. Ry. Co., (Wash.) 52 Wash. 289;
 M., K. & T. Ry. Co. v. McDuffey, 109 S. W. 1104;
 Boyce v. N. Y. City Ry. Co., 110 N. Y. Sup. 393.

Finding no reversible error in the record, the judgment of the court below is affirmed.

All the Justices concur, except Dunn, J., absent.

449 And thereafter at the July 1913 term on the 11th day of August, 1913, the following proceedings were had in said cause, to-wit:

No. 1928.

M., K. & T. Ry. Co., Plaintiff in Error,
 vs.
 IVOLEUE B. WEST, Defendant in Error.

It is hereby ordered that the mandate in the above entitled cause be, and the same is hereby stayed for sixty days.

HAYES, C. J.

450 In the Supreme Court of the State of Oklahoma.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 449 pages numbered from 1 to 449, inclusive, are a true and complete transcript of the record and all proceedings in said Supreme Court in the case of Missouri, Kansas & Texas Railway Company vs. Ivolue B. West, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court at the City of Oklahoma City, this 4th day of September, A. D. 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk*,
 By JESSIE PARDOE, *Deputy*.

Endorsed on cover: File No. 23,847. Oklahoma Supreme Court. Term No. 696. Missouri, Kansas & Texas Railway Company, National Surety Company, and American Surety Company of New York, plaintiffs in error, vs. Ivolue B. West. Filed September 10th, 1913. File No. 23,847.



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File No. 23,847.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 696.

OCTOBER TERM, 1913.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, NATIONAL
SURETY COMPANY and AMERICAN SURETY COMPANY OF NEW
YORK,

Plaintiffs in Error,

vs.

IVOLUE B. WEST,

Defendant in Error.

MOTIONS TO DISMISS THE WRIT OF ERROR OR TO
AFFIRM.

Comes now the defendant in error, Ivolue B. West, by her
attorneys of record herein, and moves this Honorable Court:

First: To dismiss the writ of error herein, on the ground
that this Court has not jurisdiction thereof, no federal question
being involved. (Rule 6.)

Second: To affirm the judgment and decision of the courts
of the State of Oklahoma, on the ground that it is manifest
that the writ of error was taken for delay only and on the

ground that even if this Court has some jurisdiction in this case, the questions upon which the same depend are so frivolous as not to need further argument.

THOMAS D. O'BRIEN,
St. Paul, Minnesota,
Attorney for Defendant in Error
for the purpose of this motion only.

S. GRANT HARRIS,
715 Commerce Bldg.,
St. Paul, Minn.

BENJ. MARTIN, JR.,
Muskogee, Okla.

CHARLES H. TAYLOR,
Long Beach, Cal.,
Of Counsel.

NOTICE OF MOTIONS.

To the above named Plaintiffs in Error, and to Joseph M. Bryson, Attorney of Record for Plaintiffs in Error in the above entitled case:

You and each of you are hereby notified that the defendant in error in the above named cause, will, on Monday, the 5th day of January, A. D. 1914, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the said Court the foregoing motions and each of them, and the brief thereon including portions of the record as contained in the appendix, all of which are hereto attached and served upon you herewith.

THOMAS D. O'BRIEN,
Endicott Bldg., St. Paul, Minn.,
Attorney for Defendant in Error
for the purpose of the motions.

S. GRANT HARRIS,
715 Commerce Bldg.,
St. Paul, Minn.

BENJ. MARTIN, JR.,
Muskogee, Okla.

CHARLES H. TAYLOR,
Long Beach, Cal.,
Of Counsel.

STATEMENT AS TO THE APPENDIX.

For the purpose of these motions, defendant in error, pursuant to the rules and practice, has caused to be printed as an appendix to this brief, portions of the record, embodying all matter contained in the transcript which bears upon the mo-

tions involved herein, omitting those parts of the transcript which are not essential to a proper consideration of the motion.

Carey v. Houston & T. C. R. Co., 150 U. S. 179;

Walston v. Nevin, 128 U. S. 578.

The Assignment of Errors from the Trial Court to the State Supreme Court of Oklahoma are embodied in the Assignment of Errors to this Court which are numbered from I to XXVI, inclusive, and hence are not printed separately in the appendix.

Exhibit "A," made a part of the Second Amended Answer of plaintiff in error, and said Exhibit "A" and Exhibit "C" made a part of the Third Amended Answer are omitted from the appendix for the reason that in form they are substantially the same as Exhibit "B" which is printed in the appendix, except that they are applications for employment as driver of an express wagon made by the deceased, and are "dated at Parsons, State of Kansas," on January 9th, and October 18th, 1893, respectively.

Defendant in error has quoted in this brief, as a part of the motion papers, what is believed to be sufficient of the Record for the proper consideration of the motions by this Court, without the necessity of further reference to the appendix, except for the purpose of verification.

STATEMENT OF THE FACTS.

The facts in the case are stated in the two Opinions of the Supreme Court of the State of Oklahoma. Original opinion Appendix pages 64-78; Opinion on Re-hearing, Appendix pages 79-90.

In so far as the facts in the case pertain to the motions here involved, they are briefly as follows:

1. This is an action for death by wrongful act.
2. William B. West, the deceased, was an express messenger in the employ of the American Express Company, and was killed while riding in an express car in the performance of

his duties, by reason of a head-on collision between two trains of the Missouri, Kansas & Texas Railroad Company, the plaintiff in error. Appendix pages 22, 37.

3. West, the express messenger, at the time of his death, was employed solely by the American Express Company as express messenger, but the Express Company required him, as a part of his duties in their employ, to handle the passenger baggage in the express car, and the railroad company paid the American Express Company for the services of West in so handling the passenger baggage, on draft from the American Express Company. Third Amended Answer, Appendix pages 37-38; Original Opinion, Appendix pages 74, 77; cross-examination of F. D. Adams, Appendix page 55.

4. West, the deceased, at the time of his death, was a resident of the State of Kansas. No personal representative was ever appointed, and this action was brought on July 8th, 1908, in the State Courts of Oklahoma in Muskogee county where the death occurred, by the widow in her own name, for the benefit of herself and four minor children, under Sections 5945, and 5946, Comp. Laws of Oklahoma, 1909, (Sections 4313 and 4314, Statutes of Oklahoma Ter. 1893, being Secs. 4611, 4612, of Wilson's Revised and Ann. Statutes 1893), as extended, modified and adopted by the Constitution of the State of Oklahoma, and especially by Sec. 7, Art. 23, Oklahoma Constitution.

These Sections of the Statutes and provisions of the Constitution above referred to, and under which the action was brought, are set out in full in the Original Opinion of the Supreme Court of Oklahoma. Appendix pages 76-77.

5. That West was killed as a result of the collision; that there was negligence for which the Railroad Company was liable, and that the trains in question were engaged in interstate and intrastate traffic were facts conclusively shown and conceded at the trial by both parties. Opinion on Re-hearing, Appendix pages 81-82.

6. A verdict of \$15,000.00 was rendered in the trial court (and judgment entered thereon) in favor of plaintiff, now defendant in error, and on appeal by plaintiff in error to the Supreme Court of Oklahoma, the judgment was affirmed, by the original opinion of that court and again by its opinion on re-hearing.

The case is now before this Court on writ of error granted by the Chief Justice of the State of Oklahoma.

STATEMENT OF THE CASE, AS BEARING UPON THE MOTIONS.

1. Plaintiff in error, on its appeal from the Trial Court to the State Supreme Court of Oklahoma, in its brief, but not in its Assignment of Errors in that court advanced the claim, that because West, the deceased, in addition to his regular duties as express messenger, also handled the passenger baggage of the Railroad Company, he was an employe of the railroad, and the trains being engaged in interstate traffic, that this action must have been brought by a personal representative under the Federal Act commonly known as the Federal Employer's Liability Act, (Act of Cong. April 22nd, 1908, C. 149; 33 Stat. at Large 65; U. S. Comp. Stat. Supp. 1909, p. 117), as the controlling Act, instead of by the widow under the State statutes.

As appears from plaintiff in error's petition for the writ of error herein, (Appendix pages 1 and 2) this is the only claim of any federal question in this case.

2. Defendant in error, on the other hand, contended, in the State Supreme Court, that West, the express messenger, was not at any time an employe of the Railroad Company, defendant in error, and hence that the action *could not* have been maintained under the Federal Employer's Liability Act; and further that the pleadings in this case show conclusively that West handled the passenger baggage as an employe of the American Express Company and not as an employe of the

Railroad Company, and that there was no issue made in this case by the pleadings as to any employment of West by the Railroad Company; and further that the undisputed testimony shows that West was paid for the services performed by him in handling the passenger baggage solely by the American Express Company, and that the Railroad Company paid the American Express Company for the services he rendered in handling the passenger baggage on draft from the American Express Company.

And defendant in error further contended that even if West had been an employe of the Railroad Company, (which he was not) that plaintiff in error waived its right to claim, as a defense, that this action should have been brought under the Federal Employer's Liability Act, by failing to plead that Act in any of its Answers, and by failing to plead facts necessary to invoke that defense, and by failing to set up or claim any right, privilege or immunity under or by virtue of that Act, and conclusively estopped itself to claim such defense or such right, privilege or immunity, by affirmatively alleging facts in its "Third Amended Answer," which showed conclusively that West was not an employe of the Railroad Company and hence that the action *could not* have been brought under the Federal Employer's Liability Act.

[Note: The Supreme Court of Oklahoma, however, never reached and was not called upon to decide, and hence did not decide the questions last referred to, viz: as to whether or not *if West, the deceased, had been an employe of the Railroad Company*, the action must have been brought under the Federal Employer's Liability Act; or whether plaintiff in error by its own allegations and failure to plead the Federal Act had waived, and was estopped to claim, as a defense, that the action must have been brought under such Act, for the very simple reason that the Supreme Court of Oklahoma *found as a Fact in the case*, that under the pleadings and undisputed evidence, West was not an employe of the Railroad Company,

and that no issue was made by the parties with respect to that matter.]

FACTS FOUND BY THE STATE SUPREME COURT.

3. The Supreme Court of Oklahoma, in its Original Opinion (Appendix pages 64-78) found as facts in the case as follows:

"Under the issues as framed, said intestate, William B. West, was an employe of the American Express Company, and not of the Railroad Company" (Appendix page 74). And further, "There is no dispute but that the intestate handled express and baggage between points in one state and also between points in one state, and points in another state, but in doing this, under the pleadings in this record, he was an employe of the Express Company and acting for the Express Company in handling such baggage. Obviously this was done by virtue of a contract between the Express Company and Railroad Company, but the Railroad Company neither saw fit to plead this contract nor to offer it in evidence, etc." (Appendix page 74.) And further, "Under the undisputed evidence in the Record, the American Express Company paid the intestate his salary, the Railway Company paying the Express Company for the handling of the baggage." (Appendix page 77.)

The syllabus of the Original Opinion of the State Supreme Court of Oklahoma, paragraph 1, is as follows:

"1. Defendant in Error's intestate being an employe of the express company, and not of the plaintiff in error (the railway company), but a passenger on its train at the time of being injured, the Federal Employer's Liability Act of April 22, 1908 (35 U. S. Stat., p. 65; U. S. Comp. Stat. 1901, p. 1322), entitled 'An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases,' does not apply."

(a) Sections 5945 and 5946, Comp. Laws 1909, apply, as modified by section 7, article 23, Constitution of this state. Appendix page 64

Again, in its Opinion on Rehearing, the Supreme Court of Oklahoma find as follows:

"From the pleadings alone it is clear that the deceased suffered the injuries which resulted in his death while he

was employed by the Express Company, not while he was employed by the Railroad Company, and that the parties did not attempt to join an issue of fact on that question." Appendix page 85.

And further as follows:

"We therefore find with the court below that the pleadings and the evidence conclusively show that the deceased suffered the injuries that resulted in his death while he was employed by the Express Company and not while he was employed by the Railway Company in interstate commerce, within the meaning of the Federal Employer's Liability Act." Appendix p. 87.

And paragraphs 1 and 2 of the syllabus of the Opinion of the State Supreme Court of Oklahoma on Rehearing, are as follows:

"1. In an action brought by a widow under a state statute against a railway company for damages for injury suffered by her husband which resulted in his death, the petition alleged that the deceased was employed by the American Express Company as an express messenger; that in addition to his duties as an express messenger, he handled the personal baggage of the inter and intrastate passengers of the railway company which was engaged in interstate commerce. The answer of the defendant admitted the foregoing allegations and further alleged that the deceased 'in performing said duties in handling said baggage was doing so under and by virtue of his said employment by the said American Express Company.' **HELD**, that the pleadings disclose that the deceased, a resident of the State of Kansas, suffered the injuries which resulted in his death while he was employed by the American Express Company as an express messenger and not while he was employed by the railway company in interstate commerce, and that the action was properly brought by the widow under the state law.

2. Evidence on the question of employment **EXAMINED** and **HELD** not to be in conflict with the allegations contained in the petition, the admissions of the answer or the evidence of the plaintiff to the same effect. That said evidence, construed as a whole and in connection with the pleadings, merely supplements the admissions of fact contained in the pleadings by disclosing that the deceased received his entire salary for all the work performed by him from the express company; and that he was rightfully up-

on the train of the railway company by virtue of an arrangement between the two companies whereby in consideration of the work performed for the express company in handling baggage, the railway company agreed to pay to the express company one-half the sum so paid." Appendix page 79.

4. Under these findings of fact as made by the Supreme Court of the State of Oklahoma, that West, the express messenger, was solely an employe of the American Express Company and was not an employe of the Railroad Company, at the time of his death, no federal question arose with respect to the Federal Employer's Liability Act, nor was any such question considered or decided or required to be considered or decided by the State Supreme Court.

ASSIGNMENTS OF ERROR AS TO FACTS FOUND BY STATE SUPREME COURT.

5. Plaintiff in error, however, seeks to call in question, in this Court on writ of error, the *Findings of Fact* of the State Supreme Court wherein that Court finds that West, the deceased, was not an employe of the railroad company.

6. The Assignments of Error relied upon by plaintiff in error on the writ of error herein, with respect to its attack upon these "Findings of Fact" of the State Supreme Court, are its Assignments of Error numbered XXIX to XLI, inclusive; XLIII to XLVIII inclusive, LI, and LIII to LVI inclusive. Appendix pages 11-13, 14-15, 15-16.

These numerous Assignments are to a great extent repetitions of each other, and are in effect embodied in the five Assignments numbered XXIX, XXX, XXXII, XXXVIII, and XXXIX, which are as follows, to-wit:

XXIX.

"The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the deceased, William B. West, was not an employe of the plaintiff in error, Missouri, Kansas and Texas Railway Company, at the time of the injury resulting in his death."

XXX.

"The Supreme Court of the State of Oklahoma erred in holding that the deceased, William B. West, was employed exclusively by the American Express Company, at the time of the injury resulting in his death."

XXXII.

"The Supreme Court of the State of Oklahoma erred in holding in its opinion and judgment that under the issues as framed in this case, the said deceased, William B. West, was an employe of the said American Express Company, and not of the plaintiff in error, Missouri, Kansas & Texas Railway Company."

XXXVIII.

"The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the parties to this case did not join an issue of fact as to whether William B. West, deceased, was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company."

XXXIX.

"The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that there were no averments in the pleadings in this case from which an inference might reasonably be drawn that a contract of employment was entered into between the deceased and the plaintiff in error, Missouri, Kansas & Texas Railway Company." Appendix pages 11, 12, 13.

BRIEF AND CITATIONS.

I.

MOTION TO DISMISS THE WRIT OF ERROR.

If West, the express messenger, was *not* an employe of the Railroad Company, it is obvious that this action could not have been brought under the Federal Employer's Liability Act. No federal question was involved, and this Court has not jurisdiction.

It was conceded by plaintiff in error in the State Supreme Court, that if West, the express messenger, was *not* an employe of the Railroad Company, the action was properly brought under the State Statutes.

[Note: The Supreme Court of Oklahoma construing its own State Statutes found that this case was so properly brought. Original Opinion, Appendix pages 76-77; Opinion on Rehearing, Appendix page 87.]

Whether or not West was an employe of the Railroad Company was a question of fact to be determined in the State Courts, from the Pleadings and from the Evidence.

The Supreme Court of the State of Oklahoma, (affirming the Trial Court) as above seen, found specifically, *as facts in the case*, that West, the express messenger, at the time of his death, was employed solely by the American Express Company and not by the Railroad Company, and that under the pleadings as framed, no issue was made by the parties as to any employment of West by the Railroad Company. Opinions, Appendix pages 74 and 87.

It is settled that on writ of error to the highest court of a state, nothing is removed for re-examination in this Court, but questions of law arising upon the Record; and that the

Findings of Fact made by a Supreme Court of the State will be the basis of the decision of this Court.

Thayer v. Spratt, 189 U. S. 346, 347;

Telluride Power Trans. Co. v. Rio Grande Ry. Co., 175 U. S. 639, 647;

Crary v. Devlin, 154 U. S. 619;

Wood v. Chesborough, 228 U. S. 672, 676;

Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 86, 97;

Chrisman v. Miller, 197 U. S. 313, 319;

Vandalia Ry. Co. v. South Bend, 207 U. S. 359, 367;

Kerfoot v. Farmers & M. Bank, 218 U. S. 281, 288;

Mammoth Mining Co. v. Grand Central Mining C., 213, U. S. 72, 77;

Delmar Jockey Club v. Missouri, 210, U. S. 324, 335;

Clipper Mining Co. v. Eli Mining Co., 194 U. S. 220, 222;

Hedrick v. Atch. T. & S. F. Ry. Co., 167 U. S. 673, 677;

Egan v. Hart, 165 U. S. 188, 189;

Dower v. Richards, 151 U. S. 658, 663.

In Crary v. Devlin, 154 U. S. 619, this Court say:

"The motion to dismiss this case is granted upon the authority of Mining Co. v. Boggs, 3 Wall. 304. There could have been no decision of the Court of Appeals against the validity of any statute of the United States because it found that the facts upon which the defendants below relied to bring their case within the statute in question, did not exist. The judgment did not deny the validity of the statute but the existence of the facts necessary to bring the case within its operation."

In Telluride Power Trans. Co. v. Rio Grande Ry. Co., 175 U. S. 639, 647, this Court say:

"The jurisdiction of this Court in this class of cases does not extend to questions of fact or of local law which are merely preliminary to or the possible basis of a federal question."

In Thayer v. Spratt, 189 U. S. 346, 353, it is said:

"Upon writ of error to a State Court, this Court has no right to review its decision upon the ground that the finding was against evidence or the weight of evidence."

It is equally well settled by the decisions of this Court that if no federal question were presented for decision in the State Court, or if the decision of the federal question presented was unnecessary to the determination of the case, or was not actually decided, or if it appeared that the judgment as rendered could have been given without deciding the federal question, the Supreme Court has no jurisdiction to review the decision of the State Court. In such cases, the writ of error should be dismissed.

Vandalia Ry Co. v. South Bend, 207 U. S. 359, 368;
 Missouri Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556, 576;
 Sea Board Air Line Ry. Co. v. Duvall, 225 U. S. 477, 487;
 Johnson v. Risk, 137 U. S. 300, 307;
 DeSaussure v. Gaillard, 127 U. S. 216;
 New Orleans v. New Orleans Water Works, 142 U. S. 79, 84;
 O'Niel v. Vermont, 144 U. S. 323, 336;
 Northern Pac. Ry. Co. v. Ellis, 144 U. S. 458;
 Davidson v. Connelly, 154 U. S. 589;
 Eustis v. Bolles, 150 U. S. 361;
 Cook Co. v. Calumet, etc., Co., 138 U. S. 635;
 Sayward v. Denny, 158 U. S. 180, 183, 184.

If the federal question was raised in the State Court, yet if the case was decided on grounds broad enough in themselves to sustain the judgment without reference to the federal question, the Supreme Court will not entertain jurisdiction.

Connecticut etc. v. Woodruff, 153 U. S. 689;
 Sherman v. Grinnell, 144 U. S. 198, 202.

In *Vandalia Ry. Co. v. South Bend*, 207 U. S. 359, this Court say:

"If the judgment of the State Court is based on a decision placed upon a sufficient non-federal ground, this Court has no jurisdiction to review it. While this Court is not concluded by the Judgment of a State Court and must determine for itself whether a federal question is

really involved, and may take jurisdiction if the State Court has in an unreasonable manner avoided the federal issue, the Writ of Error will be dismissed where no intent to so avoid the federal question is apparent."

The law, as announced by this Court in the decisions above referred to, is too well settled to require comment.

Under these decisions, it is obvious that if the findings of fact of the State Supreme Court of Oklahoma—that William B. West, deceased, was solely an employe of the American Express Company, at the time of his death, and was not an employe of the Railroad Company—have any support in the Record, this Court cannot question such findings or entertain jurisdiction on writ of error.

It has been held, it is true, by this Court, that where a finding of fact of a State Supreme Court, which has the effect of denying a federal question, has no support whatever in the Record, or where a conclusion of a State Supreme Court is based upon facts in the Record which will not, under any reasonable construction, support the conclusion of the State Supreme Court, then this Court may still entertain jurisdiction.

Such was the situation in *St. Louis, San Francisco & Texas Railway Company v. Seale*, 229 U. S. 156, where it was held by this Court, that there was no evidence whatever in the record to support the finding of the State Supreme Court—that the plaintiff was not engaged in interstate commerce,—the undisputed facts in that case showing conclusively and without contradiction that the plaintiff was, in fact, actually engaged in interstate commerce. Hence, as there was no evidence whatever in that case to support the finding of the State Supreme Court, such finding was rejected as not binding upon this Court.

Various other cases exist to the same effect.

But it has never been held by this Court that where the findings of fact of a State Supreme Court, (in effect, denying the existence of a federal question, and hence the jurisdiction of this Court,) have any support in the record, under any

reasonable construction of the pleadings and the evidence upon which the findings of fact are based, that such findings can be questioned by this Court by writ of error.

Nor, where two different constructions could be placed upon the pleadings or evidence upon which the "findings of fact" of a State Supreme Court are based, one of which constructions might give this Court jurisdiction, but which was not adopted by the State Supreme Court, will this Court undertake to apply the other, or a different, construction than that adopted by the State Supreme Court, as a basis for jurisdiction by writ of error. Citations *supra*.

In the case at bar, defendant in error, submits that the Opinions of the State Supreme Court of Oklahoma contain in themselves, sufficient quotations from the Record to show on their face that the findings of fact, as made by that Court,—*that West was solely an employe of the American Express Company and was not an employe of the Railroad Company*—are fully supported by the Record, and hence that the Opinions themselves are conclusive that no federal question is involved in this case, and that this Court has not jurisdiction.

"A motion to dismiss will be granted where it appears on the face of the Opinion, when it forms a part of the Record, that the decision of the State Supreme Court did not rest on a federal question."

Jacks v. Helena, 115 U. S. 288;

Kreiger v. Shelby Ry. Co., 125 U. S. 39, 44.

But assuming that the Opinions of the highest Court of the State of Oklahoma do not show conclusively on their face that the findings of fact as therein made with respect to the employment of West, are supported by the record, nevertheless, this Court on motion to dismiss the writ of error or affirm the judgment, will look to the pleadings and evidence sufficiently to ascertain if the findings of fact of the State Supreme Court in that regard, are supported.

Egan v. Hart, 165 U. S. 189;

Vandalia Ry. Co. v. South Bend, 207 U. S. 367.

INSPECTION OF THE PLEADINGS.

THE PETITION.

The petition with respect to the employment of West, the deceased, alleges as follows:

"That at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by said defendant company over its said line of railroad between said city of Parsons, Kansas, through the State of Oklahoma to points beyond in the State of Texas; that in addition to his duties and employment as express messenger, as aforesaid, said William B. West also engaged in handling passenger baggage upon the express cars of said defendant company.

That on May 15th, 1908, at about 12 o'clock noon of said day, said William B. West, in the course of his employment as hereinbefore set out, was riding in one of the express cars of said defendant company attached to one of the regular trains of said defendant company over said railroad line in a southerly direction in the State of Oklahoma, which train was one of the regular passenger trains of said defendant company known as No. 5 and also known as the 'Katy Flyer,' and that when said train reached a point in said State of Oklahoma a short distance southerly of the Arkansas River, between the said stations of Verdard and Muskogee, in said state of Oklahoma, said train upon which said West was so riding in the performance of his duties as aforesaid, was by said defendant railroad corporation, through gross carelessness and negligence, etc." Appendix page 22.

It will be observed that the only allegation in the petition with respect to employment, is *employment by the American Express Company*. This is the only connection in which the word "employment" is used or referred to. The fact is then alleged that in addition to his duties and employment as express messenger, West also engaged in handling passenger baggage. While it may be true that there is no express allegation in the complaint as to the employment under which West handled the passenger baggage, nevertheless, in the absence of any allegation with respect to it, the natural inference

would be (as was the fact) that the handling of the passenger baggage was work required of the express messenger by the American Express Company additional to his ordinary duties and employment as express messenger, just as the plaintiff in error subsequently alleges in its "Third Amended Answer" the fact to be. At all events, no allegation whatever is made in the petition, directly or indirectly, of any employment of West by the Railroad Company. Nor can any presumption arise from the petition that West was an employe of the Railroad Company as there is not even an allegation in the petition that the personal baggage was handled for the benefit of the Railroad Company or that the Railroad Company had any relation to or connection with the handling of the passenger baggage. The statement in the petition of the mere fact that West also handled passenger baggage does not specify or define any element going to proof of employment by the Railroad Company.

In the recent case of Missouri, Kansas & Texas Railroad Company v. Blalack, 147 S. W. Rep. 559, the Supreme Court of Texas passed directly upon the very language of the petition and at p. 559 of the Opinion of the Court in that case, it is said:

"The Railroad pleaded that Blalack was in its employ at the time, but the only proof offered was that *Blalack handled baggage which was the work of an employe*. There was no proof of any employment of Blalack by the railroad company, nor of the payment of any part of his wages, nor of any right of control over him. If the facts existed, it was so easy to have produced the evidence that the failure to do so, impresses upon the mind a conviction that the claim was unfounded. The defendant was required to prove that deceased was in its employ in order to avail itself of the Federal law; and having failed the state law governed. All the propositions and learned arguments as to the superiority of the federal law became immaterial. * * * What was the relation between Blalack and the Railroad Company? The undisputed evidence is, that Blalack was, at the time of his death, employed by the American Express Company, as its messenger."

ger to accompany and care for its express matter on the train of the plaintiff in error."

It is clear that the petition in the case at bar, cannot be construed to allege any employment of West, the express messenger, by the railroad company.

THE DEMURRER TO THE PETITION.

The demurrer to the petition does not refer to, or purport to raise any question as to, the Federal Employer's Liability Act, or as to any employment of West by the Railroad Company.

The demurrer (omitting the title and signature) is as follows:

"Comes now the defendant and demurs to plaintiff's petition filed herein and for grounds of demurrer states:

I.

That the plaintiff has no legal capacity to sue for the minor children named in paragraph three of said petition.

II.

That there is a defect of parties plaintiff in this: that the suit is brought in the name of Ivolue B. West as plaintiff while in paragraph four of said petition it is stated that the suit was brought by the plaintiff for the benefit of herself and the minor children named in paragraph three of said petition.

III.

That the petition does not state facts sufficient to constitute a cause of action on behalf of plaintiff."

It will be seen that Divisions "I" and "II" of the demurrer merely purport to raise a question that inasmuch as the petition shows that the action was brought for the benefit of the four minor children as well as of the plaintiff, the widow could not maintain the action alone in her own name, but that the children must have been joined as parties plaintiff. Appendix pages 23 and 24.

THE ANSWER.

The demurrer to the petition having been overruled by the Trial Court, defendant, now plaintiff in error, joined issue in the case, and filed its "Answer" to the petition. It contains only a general denial. Appendix page 24.

This answer does not allege or intimate that West was ever employed by the Railroad Company, nor does it set up or invoke the Federal Employer's Liability Act as a defense in the action, or allege facts which would bring the case within that Act, or show that the action *could* have been brought under that Act, or claim any right, privilege or immunity under or by reason of that Act.

THE FIRST AMENDED ANSWER.

Later, plaintiff in error filed its "First Amended Answer," in which it alleges (in addition to its former general denial,) contributory negligence, and that its trains in question were engaged in interstate commerce; but it still does not allege or intimate that West was an employe of the Railroad Company, or set up, invoke or refer to the Federal Employer's Liability Act as a defense or any facts which would bring the case within that act, or claim any right, privilege or immunity under that Act. First Amended Answer, Appendix pages 24 and 25.

THE SECOND AMENDED ANSWER.

Later, plaintiff in error filed its "Second Amended Answer," in which it repeated the allegations of its "First Amended Answer," but still did not plead that West was an employe of the Railroad Company, or set up, invoke or refer to the Federal Employer's Liability Act as a defense, or allege any facts which would bring the case within that Act, or claim any right, privilege or immunity under that Act, but directly to the contrary set out and alleged two "applications for employment," made by William B. West to the American Express

Company, and containing clauses purporting to waive the right of action for damages, the same being marked "Exhibit A" and "Exhibit B." Exhibit "A" was made and dated at Parsons, State of Kansas, January 9, 1893, and was an application for employment as driver of an express wagon. Exhibit B was made and dated at Parsons, State of Kansas, October 15, 1896, and was an application for employment as an express messenger, presumably on a local line in the State of Kansas. (See testimony of Mrs. West. Appendix pages 44 and 45.) And in addition to setting out said application for employment by West, and in connection with them, plaintiff in error expressly alleged in its Second Amended Answer, as follows:

"Further answering, defendant states that prior to the time of the alleged injury in question, the deceased, William B. West had made application to the said American Express Company in writing for employment by it as an express messenger, and that in pursuance of said application he was prior to and at the time of the alleged injury in question employed by the said American Express Company under a contract in writing between him and said company, which contract was dated October 15th, 1896, a copy of which is hereto attached marked Exhibit 'B' and made a part hereof, and which said contract includes as part of its provisions the contract hereinbefore referred to and marked Exhibit 'A.' * * *

"Further answering, defendant states that at the time of the alleged injury in question the deceased was in the express car being transported by this defendant over its said line of railway and was in said car in pursuance of said contract hereinabove referred to as Exhibit 'B.'" See Second Amended Answer, Appendix pages 26, 27 and 28.

These allegations of the "Second Amended Answer" of plaintiff in error show beyond dispute that West, at the time of his death, was an employe of the American Express Company, and that, at the time of the collision, West was in the express car pursuant to his duties as express messenger and as such, was being transported by plaintiff in error while he was riding

in pursuant of his employment as employe of the American Express Company.

THE DECEASED WAS A PASSENGER.

[Note: Under these allegations of plaintiff in error, West, so far as the Railroad Company was concerned, was a passenger, under numerous decisions which have never been questioned:

Missouri, K. & T. Ry. Co. v. Blalack, 147 S. W. Rep. 559;
 Fordyce v. Jackson, 56 Ark. 594;
 Brewer v. New York etc. Ry. Co., 124 N. Y. 59;
 Yoemans v. Contra Costa et. Co., 44 Cal. 71;
 Blair v. Erie Ry. Co., 66 N. Y. 313;
 Jennings v. Grand Trunk Ry. Co., 15 Ont. App. 477;
 Foulkes v. Metropolitan Dist. R. W. Co., 5 C. P. D. 157;
 Southern Railway Co. v. Harrington, 52 So. Rep. 57;
 Gulf, etc. Ry. Co. v. Wilson, 79 Tex. 371; 15 S. W. Rep. 280;
 Davis v. Chesapeake & O. Ry. Co., 92 S. W. 339;
 Voight v. Baltimore, etc. Ry. Co., 79 Fed. Rep. 561, 566;
 Prince v. International, etc. Ry. Co., 64 Tex. 144;
 Collett v. L. & N. W. Ry. Co., 16 Adel & E. 984;
 Railway Co. v. Ketchum, 133 Ind. 346;
 Jones v. Railway Co., 125 Mo. 666;

And see Original Opinion of Supreme Court of Oklahoma in the case at bar, Appendix page 78.]

THE THIRD AMENDED ANSWER.

But before issue was fully joined, plaintiff in error filed its "Third Amended Answer," and the answer upon which this case was tried.

In its "Third Amended Answer," plaintiff in error still failed to set up or invoke as a defense or refer to the Federal Employer's Liability Act, and still failed to allege that West was an employe of the Railroad Company or to set up any facts

to bring the case within said Federal Act, or to claim any right, privilege or immunity under that Act, but on the contrary, it therein again set up and repeated all of the allegations of its "Second Amended Answer" above referred to, and in addition alleged specifically with respect to *the employment* under which West handled the passenger baggage, as follows:

"Further answering, defendant admits that at and prior to the death of said William B. West, deceased, he was employed by the American Express Company, as express messenger, upon the express cars operated by the defendant railway company over its line of railroad between the city of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas, and admits that the deceased William B. West, in addition to his employment as express messenger by said American Express Company, was also engaged in handling passenger baggage upon the express car of the said defendant railway company, and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by said American Express Company, (Italics ours) and that such handling of such baggage by said West was for and in behalf of and under the direction of said railway company." Appendix pages 37 and 38.

If from the allegations of the petition in this case, there was any doubt, uncertainty or ambiguity as to the employment under which West, the deceased, handled the passenger baggage, then the specific allegations of this "Third Amended Answer of plaintiff in error fully supplied such deficiency and rendered the facts entirely clear, definite and certain with respect to that matter; for plaintiff in error specifically alleges "that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his employment by said American Express Company."

These allegations of the "Third Amended Answer" in and of themselves render impossible any successful claim by plaintiff in error that West was an employe of the Railroad Company by reason of his handling the passenger baggage.

This answer never was amended or sought to be amended at any time, by plaintiff in error.

In view of these allegations of plaintiff in error, the Supreme Court of the State of Oklahoma necessarily found that under the issues as joined, West was an employe of the American Express Company and not of the Railroad Company.

With respect to the Pleadings, the Supreme Court of Oklahoma in its Opinion on Rehearing, finds as follows: Appendix pages 84 and 85:—

"It is specifically alleged in the petition that the deceased 'was employed by the American Express Company as an express messenger.' This is the only allegation to be found in the petition that attempts to state specifically by whom the deceased was employed, and there are no allegations elsewhere in the petition which necessarily negative that positive statement, or from which it may be reasonably inferred that the deceased was also employed by the railway company. But if the clear meaning of the specific allegation of the petition upon that point was clouded by the allegation which immediately follows it, to the effect that the deceased was also engaged in handling passenger baggage upon the express car of said defendant railway company, the Answer of the defendant makes the situation entirely clear. In its Answer the defendant, by way of admission, uses the language of the petition, 'That at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of railroad between the city of Parsons, Kansas, through the state of Oklahoma, to points beyond in the state of Texas, and admits that the deceased, William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express car of the said defendant railway company,' and immediately adds, '*and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by the said American Express Company.*' The foregoing admissions are in entire harmony with the balance of the answer, which contains allegation after allegation positively stating that the deceased was employed by the express company continuously for a great many years prior

to his death, and the contracts of employment between the express company and the deceased are attached to the answer and made a part thereof, and certain waivers contained therein are relied upon as a defense. From the pleadings alone it is clear that the deceased suffered the injuries which resulted in his death while he was employed by the express company, and not while he was employed by the railway company; and that the parties did not attempt to join an issue of fact upon that question. Counsel for the railway company seem to base their contention on this point, solely upon the theory that the allegation to the effect that the deceased was also engaged in handling personal baggage in addition to his duties as express messenger is sufficient to create the presumption that he was jointly employed by the railway company, and cites *M. K. & T. Ry. Co. v. Reasor*, (Tex.) 68, S. W. 332; *Vary v. C. R. R. & M. Ry. Co.*, 42 Ia. 246, and *Oliver v. Northern Pac. Ry. Co.*, 195 Fed. 432, as being authority to that effect. Those cases are so clearly distinguishable from the one at bar that we do not deem it necessary to notice them further than to say that in our judgment they are in no way in conflict with the conclusion herein reached. It is not disputed that the deceased handled interstate baggage, but the answer explains that in handling said baggage he was doing so under and by virtue of his said employment by said American Express Company. Moreover, there are no averments in the pleadings from which an inference may be reasonably drawn that any contract of employment was ever entered into between the deceased and the railway company."

"The construction of a pleading and the meaning to be given to its various allegations * * * are as a general rule, local questions."

Vandalia Rv. Co. v. South Bend, 207 U. S. 359.

Under the specific allegations of plaintiff in error above referred to, in its "Third Amended Answer," on which the case was tried, it became a fact in this case, so far as plaintiff in error is concerned, or can claim, "that said William B. West, deceased, in performing said duties in handling said baggage was doing so under and by virtue of his employment by said American Express Company."

No possible claim by plaintiff in error, that West was an employee of the Railroad Company could arise in this case

unless it were from the fact that West handled the passenger baggage,—and when plaintiff in error in its Third Amended Answer specifically and most emphatically states, that West did this as employe of the American Express Company, it became a fact, in effect, stipulated into the case by plaintiff in error, which necessarily prevented plaintiff in error from successfully claiming exactly the opposite on appeal to the State Supreme Court and which prevents it from so claiming on writ of error in this Court. To make any argument or claim at all that West handled the passenger baggage as employe of the Railroad Company, plaintiff in error must entirely ignore and directly contradict the specific allegations of its own answer in that regard.

This is not a case where the plaintiff in error has merely omitted to set up in its answer as a defense, the Federal Employer's Liability Act, (or facts necessary to bring the case within that Act,) but it is a case where plaintiff in error has gone further and affirmatively pleaded facts which render the Federal Employer's Liability Act impossible of application in this case. By the plain allegations of its Third Amended Answer plaintiff in error eliminates the possibility of any claim by it that this action should have been brought under the Federal Employer's Liability Act.

Plaintiff in error in the State Supreme Court, dwelt upon the fact that after alleging in its Third Amended Answer "that said William B. West, deceased, in performing said duties in handling said baggage *was doing so under and by virtue of his employment by said American Express Company,*" it added these words: "And that such handling of such baggage by said West was for and in behalf of and under the direction of, said Railway Company," and sought to claim that these added words impliedly meant that West handled the passenger baggage as employe of the railroad company, directly contrary to its specific allegation in that regard. This claim is clearly frivolous. The additional allegation "that such hand-

ling of such baggage by said West was for and in behalf of * * * said Railroad Company" was in no way inconsistent with the previous specific allegation, as it relates in no way to the employment under which the work was being done. The work, of course, was for the benefit of the Railroad Company, though being done by West under employment of the American Express Company, precisely as plaintiff in error alleges the facts to be.

Neither are the further additional words in the answer, viz: "and under the direction of the Railroad Company," necessarily inconsistent with the previous specific allegation, as to the employment. However, the undisputed testimony of Mr. Bird, witness for plaintiff in error, and who was superintendent for the American Express Company is, *that West was acting directly under his supervision*. And this is the only testimony in the case with respect to that matter:

Question by Mr. Allen:

"Q. Who was he working under, Mr. Bird?

A. Under my direct supervision."

Appendix page 56.

It is too obvious to require argument that the findings of the State Supreme Court that West was an employe of the American Express Company and not of the Railroad Company and that no issue was made by the pleadings with respect to that matter are fully supported, by the pleadings.

It further appears conclusively that nowhere in the Pleadings did plaintiff in error set up the Federal Employer's Liability Act as a defense or facts sufficient to invoke that Act, or in any way claim any right, privilege or immunity under that Act, but on the contrary, that plaintiff in error, affirmatively alleged facts which prevents it from claiming that this action should or could have been brought under said Federal Act.

It is also obvious that plaintiff in error never *undertook or intended* to invoke, or claim any right, privilege or immunity

under, the Federal Employer's Liability Act, and never intended to allege or claim that West was an employe of the Railroad Company with respect to handling the passenger baggage, else plaintiff in error would have so alleged in specific terms and would not have alleged, "that said West in handling said passenger baggage was doing so under and by virtue of his employment by the American Express Company."

Plaintiff in error had peculiar knowledge as to whether West handled the passenger baggage as its own employe, or as employe of the American Express Company, when it made and filed its Third Amended Answer, specifically alleging that West did this as employe of the American Express Company.

In fact, as appears from the pleadings, plaintiff in error made and filed its Third Amended Answer for the sole purpose of stating its position in this case with respect to the employment of West in the handling of the passenger baggage; for the only allegations of the Third Amended Answer, additional to those contained in the Second Amended Answer are the allegations contained in the paragraphs wherein it is alleged that West handled the passenger baggage as employe of the American Express Company. Pleadings, Appendix pages 26-28 and 35-38.

The plaintiff in error never intended to claim that West was an employe of the Railroad Company is also shown by the fact that the only defense set up and relied upon by it in any of its various Answers (outside of the defense of contributory negligence, which was abandoned at the trial), was that of the pretended contracts of waiver set out in its Second and Third Amended Answers and marked Exhibits "A," "B" and "C." And these exhibits show on their face that West's employment was under the American Express Company and not under the Railroad Company, and in order to avail itself of these instruments as a defense plaintiff in error was obliged to and did allege and claim that West was working under them, and hence that West was an employe of the American Express Company;

and not until after plaintiff in error had failed, at the trial, to get said Exhibits "A," "B" and "C" allowed in evidence, did plaintiff in error even suggest that West was an employee of the Railroad Company. Appendix pages 50-55.

[Note: Exhibit "C" above referred to, was added as an amendment to the "Third Amended Answer" by plaintiff in error at the trial.]

These applications for employment, (Exhibits "A," "B" and "C") made between West and the American Express Company, were not allowed in evidence as waivers, first, because the testimony of Mrs. West tended to show that they related to other positions of employment in which West was engaged years before he began the employment in which he was engaged at the time of his death, (Appendix pages 44 and 45) and, second, because they were void under a Section of the Kansas Statutes which was pleaded by defendant in error in its Replies to the Second and Third Amended Answers of plaintiff in error. (See Opinion on Rehearing, Appendix pages 88 and 89.) These exhibits, however, were pleaded by plaintiff in error and hence can be properly referred to as admissions against it. They all show on their face that any employment of West under them was employment by the American Express Company and not by the Railroad Company; and plaintiff in error specifically alleged that West was working under them. Appendix pages 28-31.

With respect to the excluding of Exhibits "A," "B" and "C" from the evidence by the lower Court, the Supreme Court of Oklahoma in its Opinion on Rehearing says:

"The third assignment of error arises out of the action of the court in refusing to admit in evidence the contract of employment containing the waivers. We do not think the action of the court below in that regard was erroneous. In the first place it is not clear that the contracts offered cover the employment in which the deceased was engaged at the time of his death. That would be a sufficient ground for excluding them. It also appears that the contracts were Kansas contracts. If we hold that they must

be construed according to the laws of that state, we find that under the laws of Kansas, as construed by the highest court thereof, the waiver clause is held to be void. *Sewell v. A. T. & S. F. Ry. Co.*, 78 Kan. 17. And if we hold that the contract is by its terms tied to the torts and the law of the place of the tort must govern (*Smith v. A. T. & S. F. Ry. Co.*, 194 Fed. 79) as the cause of action arose since statehood, we must hold the waiver clause void under Section 8, Article 23, Williams' Constitution which provides that, 'Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void.'

Appendix pages 88-89.

See also, paragraph 2 of the Syllabus of the Original Opinion, Appendix page 64.

From an inspection of the Pleadings it is clear that it would be frivolous to claim that the finding of the Supreme Court of Oklahoma, (viz: that under the pleadings West was an employe of the American Express Company in handling the passenger baggage and not of the Railroad Company, and that no issue was made by the parties with respect to that fact,) is not supported by the Record, for under the Third Amended Answer of plaintiff in error no other finding could have been made.

INSPECTION OF THE EVIDENCE RELATING TO THE EMPLOYMENT OF WEST.

But the Supreme Court of the State of Oklahoma found as a fact in the case, from the *Evidence*, as well as from the Pleadings, that West, the deceased, at the time of his death, was solely an employe of the American Express Company, and was not an employe of the Railroad Company. Appendix pages 86-87.

An inspection of the *evidence* with respect to the employment of West not only shows that this finding of the State Supreme Court is supported by the evidence, but that no other

finding could possibly be made under the testimony with respect to that matter.

The testimony and proceedings relating to the employment of West, which directly support the findings of fact of the State Supreme Court, are in part as follows:

The testimony of Mrs. West, widow of the deceased, with respect to the employment of Mr. West is:

Direct examination, by Mr. Taylor:

"Q. At the time of his (Mr. West's) death, what was his occupation?

A. He was an American Express Messenger.

Q. Was he working for the American Express Company at that time?

A. Yes, sir.

Q. In what capacity?

A. Messenger.

Q. Where?

A. In the express car."

Appendix pages 42-43.

Mrs. West further testified in substance that West had been working in the employment in which he was engaged at the time of his death, for the American Express Company, as express messenger on the 'Katy Flyer' on the main line, for five years; that he had been engaged, previously, in various other positions of employment with the American Express Company for a period of about 19 years in the aggregate; part of the time (in the early days) as driver of an express wagon, part of the time in the offices of the American Express Company at Parsons, Kansas, and part of the time as express messenger on local lines in the State of Kansas. Appendix pages 42-45.

Mr. Adams, General Superintendent for the American Express Company, and a witness for plaintiff in error, on cross-examination testified as follows:

"Q. Who paid Mr. West?

A. He drew his money from the Express Company.

Q. All of his salary came from the Express Company?

A. Yes, sir.

Q. And for any work he did for them, (the American Express Company) in handling baggage, the Railroad Company would pay over to the Express Company?

A. They paid us (the American Express Company) one-half of his salary; we drew a bill against them (the Railroad Company) in his name and the other baggage men."

Appendix page 55.

Mr. Bird, superintendent of the American Express Company, and a witness for plaintiff in error, testified as follows:

"Q. Who was he, (West), working under, Mr. Bird?

A. Under my direct supervision."

Appendix page 56.

The testimony of Mrs. West, that West's employment at the time of his death was under the American Express Company was undisputed; the testimony of Mr. Adams, that the American Express Company paid West all of his salary, and that the Railroad Company paid them, the American Express Company, for the services of West in handling the passenger baggage, on draft from the American Express Company was undisputed; and the testimony of Mr. Bird, that West worked under his direct supervision, as Superintendent of the American Express Company, was not questioned or contradicted in the record.

With respect to the testimony of Mr. Adams, the Supreme Court of Oklahoma in its Original Opinion, says:

"Under the undisputed evidence in the record the American Express Company paid the intestate his salary, and the Railroad Company paid the Express Company for the handling of the baggage."

It is elementary, that the primal elements of proof going to show employment are, 1st, with whom is the contract of employment made; 2nd, from whom does the employe receive his pay; 3rd, under whose direction is the employe engaged, and 4th, who has the right to hire and discharge him?

From the testimony above referred to, it appears that every element going to show that West was an employe of the American Express Company was proven, and there is absolutely no proof in the record of a single element going to show employment of West by the Railroad Company.

Hence it could not even be claimed in this case that the question of employment, is a mixed question of law and fact for there is nothing upon which to predicate a question of law.

There is not even a claim by plaintiff in error of any contract of employment between West and the Railroad Company, nor any proof that the Railroad Company paid him any money or that he worked under the direction of any official of, or person connected with, the Railroad Company, or that the Railroad Company had, or claimed to have any right to hire or discharge him.

If West had been, in fact, an employe of the Railroad Company it would have been a very simple matter for plaintiff in error to have alleged, and then to have proved it by direct and positive evidence. Had West been an employe of the Railroad Company, his name would have appeared upon the books of the Railroad Company, as an employe, and the fact of his employment by the Railroad Company could readily have been proved, either, by a written agreement between him and the Railroad Company, had there been one, or by the testimony of officers or officials of the Railroad Company, had such contract been an oral one.

But plaintiff in error made no attempt to prove *any* contract of employment whatever between West and the Railroad Company, either written or oral; nor did it call any officer or official of the Railroad Company as a witness to show any employment of West by the Railroad Company; nor could it properly have been done so under its pleadings.

The only claim made by plaintiff in error in the State Supreme Court that there is even an inference in the testimony that West was an employe of the Railroad Company, was based

upon an answer of its witness, Adams, drawn out by a leading question of counsel for plaintiff in error on direct examination, as follows:

"Question by Mr. Allen :

Q. Do you know whether Mr. West, at the time he was employed as messenger, knew that he was to handle the baggage of the Railroad Company and act as joint employe of the Railroad Company and the Express Company?

Mr. Taylor: As to his opinion as to what Mr. West knew at that time, we object as incompetent, irrelevant, and immaterial.

By the Court: Objection overruled.

Mr. Taylor: The plaintiff excepts.

A. He did, and was told to post himself in the work of both companies."

Appendix page 55.

This is the only question and answer in Adams' testimony where the word *employe* is used in connection with testimony describing the work being done by West; and in this instance the word was not used by the witness, but by counsel in a leading question.

The question, unquestionably calls for incompetent testimony and for a mere opinion of the witness, and so far as the word *employe* is concerned, for a mere legal conclusion of the witness.

However, notwithstanding the use of the word "*employe*" in the question, the language of the question taken as a whole, shows that the employment was recognized and understood to be employment by the American Express Company, for the language is, "Do you know whether Mr. West, at the time he was employed as messenger, knew, etc."

And the answer of the witness shows on its face that the employment was in fact by the American Express Company, for it shows that West was told by the Superintendent of the Express Company, to post himself in the work of both companies.

It also appears from the Appendix page 54 that by further direct examination, the same witness was led to use such expression as, "joint messenger and baggage man," and, "worked for both companies." But it is plain from the testimony of the witness given on cross-examination and above quoted, that these expressions were intended by the witness to relate only to the joint work being done by West, and not to his being an employe of the Railroad Company in a legal sense; else they were mere conclusions of the witness, without any foundation in the Record to support them, and conclusions entirely disproved by the witness himself on his cross-examination when he testified directly, that, "all of West's salary came from the Express Company, and that the Railroad Company paid the Express Company for the services performed by West in handling the passenger baggage, on draft from the American Express Company." Hence, any inferences that might be drawn from the testimony of Adams on direct examination with respect to West being employed by the Railroad Company, were entirely annulled on cross-examination wherein Adams explained and testified clearly as to just what the relation was between the two companies with respect to the handling of the passenger baggage by Mr. West. Moreover, this testimony of Adams on cross-examination, is exactly in accord with the allegation of plaintiff in error in its "Third Amended Answer," wherein it specifically states, "that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by the said American Express Company."

Inasmuch as the cross-examination of Adams shows conclusively that West was solely an employe of the American Express Company, and entirely annuls any inference to the contrary that might otherwise be claimed from his direct examination, there is not a scintilla of evidence in the case to raise a question for the jury as to any employment of West by the Railroad Company. Appendix page 55.

The mere fact that West might have been termed "a joint express messenger and baggage man" and that he did the work of both companies, clearly, is not proof of employment by the railroad company, nor is it inconsistent with the allegation of the Railroad Company, that in handling the passenger baggage West was doing so, "under and by virtue of his employment by the American Express Company."

Missouri, Kansas & Texas Ry. Co. v. Blalack, 147 S. W. Rep. 559.

With respect to the testimony of Adams, the Supreme Court of Oklahoma, in its Opinion on Rehearing say: (Appendix pages 86-87):

"On rehearing it is contended that the evidence adduced at the trial discloses that the injury was suffered while the deceased was employed by the railroad company and that, even if no issue of fact on the question of employment was joined by the pleadings, the case as to parties must be governed by the Employer's Liability Act. It is familiar law that if during the course of the trial it develops that the real case is not controlled by the state statute, but by the federal statute, and the case is commenced under the former, the case pleaded is not proved and the case proved is not pleaded. *St. Louis & S. F. Ry. Co. v. Seale*, 229 U. S. 156, Sup Ct. 651, 57 L. Ed. But in our judgment, that rule is not applicable here. The evidence of Mr. Adams, an officer of the Express Company, relied upon by counsel, is in no way inconsistent with the allegation of the petition and the admissions of the answer, to the effect that the deceased was employed by the Express Company at the time of his death. It is true that Mr. Adams testified that the deceased 'was a joint messenger and baggage man' and that 'he worked for both companies,' (which expressions under proper circumstances might be held sufficient to take the case to the jury on the question of employment. *Ry. Co. v. Reasor*, *supra*; but upon cross-examination it was clearly shown that the witness merely drew erroneous conclusions from admitted facts and that his testimony as a whole supplemented the allegations of the petition and the admissions of the answer by more fully disclosing the relations existing between the Express Company and the deceased, and the Express Company and the Railway Company, and made it more clearly apparent that the decedent was rightfully on the train. Construing the allega-

tions of the petition, the admissions contained in the answer, and the evidence of Mr. Adams together a state of facts is disclosed almost identical with that in the Blalack case, *supra*. * * *

"We therefore, find with the court below that the pleadings and the evidence conclusively show that the deceased suffered the injuries that resulted in his death while he was employed by the Express Company, and not while he was employed by the Railway Company in interstate commerce within the meaning of the Federal Employer's Liability Act."

From the evidence in the record, it is perfectly plain that the defendant in error could not have maintained her action under the Federal Employer's Liability Act, and that had she attempted to do so, a dismissal of the action must certainly have resulted for the reason that she would not have been able to produce a particle of evidence that West had been employed by the Railroad Company; and because plaintiff in error easily would have been able to substantiate the allegations made by it in its Third Amended Answer, that West handled the passenger baggage under and by virtue of his employment by the American Express Company, and would easily have been able to have shown (as it did in fact) that it (the railroad company) paid West nothing whatever, but on the contrary that it paid the Express Company an amount equal to one-half of West's wages by reason of the Express Company requiring West to handle the passenger baggage of the Railroad Company.

In order to have maintained her action at all under the Federal Employer's Liability Act, it would have been necessary for defendant in error to have alleged and proved that the deceased was an employe of the defendant Railroad Company at the time of his death. Plaintiff could not have alleged or proven this, as the undisputed evidence in the case shows as before seen that the deceased was solely an employe of the American Express Company, employed and paid by it, and acting under such employment at the time of his death. The

most that could have been shown, (and as was actually shown) would have been that West, the express messenger, was required by the American Express Company, as its employe, in addition to handling the express to also handle passenger baggage in the express car, by reason of some arrangement between his employer, the American Express Company, and the defendant, Railroad Company; and that the Railroad Company paid the Express Company for requiring West, its employe, so to do. Deceased had no contract of employment whatever with the Railroad Company, and the Railroad Company paid him nothing, as appears from the undisputed evidence.

With respect to this the Supreme Court of Oklahoma, in its Opinion on Rehearing, says:

"From a careful investigation of the entire Record we are persuaded that if we should reverse the judgment of the court below, upon the ground that the deceased suffered the injuries which resulted in his death, while he was employed by the Railroad Company, we would compel the widow to abandon the tenable theory upon which she brought the case and to accept one less advantageous to her and her children, and one which it would be difficult, if not impossible, to establish."

Appendix pages 86 and 87.

In connection with the testimony of Adama, General Superintendent of the Express Company, plaintiff in error offered in evidence a printed circular issued by the Express Company to its express messengers and by its terms giving them directions with respect to the handling of the passenger baggage for the purpose of showing through a recital contained in the Circular that West was an employe of the Railroad Company.

Such method of proving *employment* was clearly incompetent, nor was such proof admissible under the pleadings of plaintiff in error. The circular was therefore excluded by the trial court as not admissible as proof of employment of West by the Railroad Company; and in excluding it, the trial court remarked that such recital would amount to nothing more than

proof of a conversation with a person now deceased. Appendix page 54.

Plaintiff in error claimed an exception, however, and assigned as error in the State Supreme Court the refusal to admit the circular in evidence and in its Reply Brief, in the State Supreme Court, attempted to argue that point. But the State Supreme Court refused to consider this Assignment of Error, for the reason that plaintiff in error had failed to preserve the assignment, under the Rules of the State Supreme Court by not arguing the point in its original brief. Hence, any Assignment of Error with respect to the exclusion of the circular, cannot be considered here, on writ of error.

Original Opinion of the State Supreme Court, Appendix page 76.

[Note: However, this printed circular, notwithstanding the recital in it, shows on its face that West was employed solely by the American Express Company and not by the Railroad Company; for on its face, it appears that the Railroad Company had complained to the American Express Company that passenger baggage of the Railroad Company was not being properly handled by certain express messengers, and the American Express Company, by the printed circular in question, was giving directions to the express messengers with respect to their duties in handling the passenger baggage. If West had been an employee of the Railroad Company as recited in the circular why should the Railroad Company complain to the American Express Company with respect to his failure to properly handle the passenger baggage; and why should the American Express Company give West his orders with respect to the handling of the passenger baggage?

It is obvious therefore from the Circular itself that the recital therein contained and sought to be introduced by plaintiff in error, simply meant this: that whereas the Railroad Company pay us, the American Express Company, for the handling of the passenger baggage, an amount equal to one-half of your

salary, you should do that part of the work which we (the Express Company) require of you, as thoroughly as though you were in fact an employe of the Railroad Company. Appendix pages 56 and 57.

No further attempt was made by plaintiff in error to prove employment of West by the Railroad Company. Hence, there is not a particle of evidence in the case (nor was any competent evidence offered) tending to indicate that West was an employe of the Railroad Company.

To sum up the evidence as to the employment of West, the undisputed testimony of Adams, witness for plaintiff in error, is that West received all his salary from the American Express Company; the testimony of Mr. Bird is, that West worked directly under his supervision, Bird being Superintendent of the American Express Company; the testimony of Mrs. West is, that West at the time of his death was engaged as express messenger under employment of the American Express Company; the contracts of waiver pleaded by plaintiff in error, but excluded from the evidence, show on their face that as between the Railroad Company and the Express Company West was an employe of the Express Company and not of the Railroad Company; the printed circular offered in evidence by plaintiff in error, but excluded, shows that the orders given the express messengers with respect to the handling of the passenger baggage came from the Express Company only; and in direct accord with all this evidence, the allegation of plaintiff in error in its Third Amended Answer is, clear and emphatic—"that said William B. West, deceased, in handling said passenger baggage, was doing so *under and by virtue of his employment by said American Express Company.*"

In view of the foregoing facts which appear from the most casual inspection of the pleadings and the evidence any attempt in this court on writ of error to question the Findings of Fact as made by the highest Court of the State of Oklahoma—that West, the deceased, under the pleadings and the evidence,

was an employe of the American Express Company, and not of the Railroad Company, is so clearly frivolous as to require no argument.

CLAIM ADVANCED BY PLAINTIFF IN ERROR.

Plaintiff in error undertook to claim in the State Supreme Court (Assignment of Error No. XXXI,) that, even though there was no issue made by the pleadings or by the evidence as to West being an employe of the Railroad Company, that nevertheless all parties and the Court tried the case on the theory that West was an employe of the Railroad Company.

In view of the allegations of plaintiff in error with respect to this in its Third Amended Answer, upon which the case was tried, and in view of its attempt to make proof with respect to it by Adams and by the printed Circular, and the objections to such proof by counsel for defendant in error, and the exclusion of the Circular by the trial court, such claim by plaintiff in error is clearly frivolous.

Counsel for plaintiff in error, in attempting to make proof that West was an employe of the railroad, said (Appendix page 53) :

"Mr. Ralls: We offer this for the purpose of showing that the deceased was a joint employe of the American Express Company and the Missouri, Kansas & Texas Railway Company while he was running as messenger on the line." And again (Appendix page 54) : "Mr. Allen: We offer to show by Mr. Adams that at the time Mr. West went into the service as messenger he understood that it was his, West's, duty to perform joint services for the Railway Company and the Express Company." "Mr. Taylor: Further than the matters offered to be shown are admitted by the pleadings we object to the offer as incompetent, irrelevant and immaterial."

If counsel for plaintiff in error (with its own allegation directly to the contrary,) actually believed that the case was being tried by all parties and by the Court on the theory that West handled the passenger baggage as employe of the Rail-

road Company instead of as employe of the Express Company, then why its successive attempts to make such proof and why the objections of opposing counsel, and why the exclusion of such proof and the printed Circular by the Court?

Plaintiff in error, by its Assignments of Error, (Appendix pages 3-17) claimed to be aggrieved because it was not allowed under its pleadings, to prove that West was employed by the Railroad Company, and because the printed Circular, offered for that purpose was excluded by the trial court; and at the same time seeks to argue that it was conceded by all parties, and the case tried on the theory, that West was an employe of the Railroad Company.

NO RIGHT CLAIMED UNDER FEDERAL ACT IN STATE COURTS.

Not only did plaintiff in error fail to plead the Federal Employer's Liability Act, as before seen, but at no time during the trial in the lower court was that Act referred to or any claim of right, privilege or immunity under it, made or invoked by plaintiff in error.

Plaintiff in error, as appears from the Record, never at any time called the attention to the lower court or of opposing counsel to any claim by it that the action should or could have been brought under the Federal Employer's Liability Act, and in view of its own express allegation, "that West was handling the passenger baggage under and by virtue of his employment by the American Express Company," both the lower court and counsel for defendant in error, were deterred from surmising during the trial that plaintiff in error contemplated such claim, if in fact, it did.

At the close of the trial in the lower court, plaintiff in error made certain requested instructions including the idea of West being an employe of the Railroad Company, and from which requested instructions it might have been surmised (except from the allegations made by plaintiff in error in its Third

Amended Answer) that plaintiff in error might have had in mind the Federal Employer's Liability Act; or possibly the Sherman Act, or the Hepburn Act.

These requested instructions are embodied in Assignments of Error numbered XV, XVI, and XVIII, and are as follows:

XV. (3.)

"If you find from the evidence in this case that the said W. B. West was employed by the defendant as baggage master and was acting as such at the time of his death, you will find the issues in favor of the defendant."

Appendix p. 8.

XVI. (4.)

"If you find from the evidence in this cause that the deceased, W. B. West, was an employe of the defendant, at the time he received the injuries which caused his death, and that as such employe he was engaged in interstate commerce as hereafter explained, then the laws of the United States would govern the liability of the defendant herein."

Appendix p. 9.

XVIII. (6.)

"If you find from the evidence that the train upon which West was working was at the time of his death engaged in commerce between the states and that he was an employe of the defendant, the plaintiff is not entitled to recover."

Appendix p. 9.

These requested instructions were, each and all of them, clearly improper requests, and in none of them is the Federal Employer's Liability Act mentioned.

Requested instruction No. 3 (Assignment XV) is too general in its terms, in that it requests—on only a part of the evidence—that *all issues in the case* be found in favor of the defendant, ignoring all questions of waiver and estoppel that might arise from the evidence and from the allegations of the Answers interposed by plaintiff in error, and in that it is too

vague, indefinite and misleading to be insisted upon as a proper instruction, or as a claim of any right, privilege or immunity under any particular Federal Act.

Requested Instruction No. 4 (Assignment XVI) is likewise objectionable and for the same reasons, and for the further reason that the request that the jury under the conditions mentioned, (being only a part of the evidence,) be charged that the laws of the United States would govern the liability of the defendant, is too vague, general and indefinite and would mean nothing to the jury, no particular law of the United States being designated, and no claim of right, privilege or immunity under any Federal Act being set up or claimed.

Requested Instruction No. 6 (Assignment XVIII) is likewise objectionable on the same grounds, namely: that the language of the request is too vague and indefinite to constitute a proper instruction and that no particular Act or claim of right, privilege or immunity is specified.

It is elementary, that "in order to entitle the party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the Court might give to the jury without modification or omission." It must also be a complete and accurate statement of the law, and sufficiently complete, clear and definite to be understood by the jury.

Blashfield on "Instructions to Juries," Sec. 137.

"The trial court is not under obligation to give special charges based on only a part of the evidence."

Seaboard Air Line Ry. Co. v. Duvall, 225 U. S. 477.

The requested instructions above considered, were refused by the lower court. They clearly could not have been properly given for various reasons: First, because there was no issue under the Pleadings as to any employment of West by the Railroad Company; Second, because there was no testimony or evidence in the case sufficient to raise an issue for the jury

with respect to West being an employe of the Railroad Company; Third, because by reason of its own allegations, as contained in its Third Amended Answer, plaintiff in error was estopped to claim any issue in the case with respect to West being an employe of the Railroad Company by reason of his handling the passenger baggage; Fourth, because, as above stated, the language used by plaintiff in error in each and all of its requested instructions above referred to was too vague and indefinite and was not a correct and complete statement of the law, and would have been misleading to the jury.

Furthermore, if any issue of fact as to whether West was an employe of the Railroad had been raised by the Pleadings or by the evidence, the general charge of the Court covered such issue. Appendix pages 59-62. And it is well settled that a general verdict of a jury will be deemed to have covered the general issue.

Van Pelt v. Otter, 32 N. Y. Super. Ct. 202;

Torrance v. Strong, 4 Or. 39;

Kelton v. Bevens, 3 Tenn. 90.

Therefore not only was no right, privilege or immunity under the Federal Employer's Liability Act, set up or claimed by plaintiff in error in its Pleadings or at any time during the trial in the lower court but no such claim was specifically set up by it in any of its Assignments of Error to the State Supreme Court.

It is settled by numerous decisions of this Court that where a federal question which is claimed in this court to be involved, has not been clearly and specifically claimed and called to the attention of the Trial Court, or by proper Assignments of Error to the State Supreme Court, in such manner that the State Courts must have understood and passed upon the question, then such federal question cannot be availed of to give this Court jurisdiction on writ of error.

Waters-Pierce Oil Co. v. Texas, No. 1, 212 U. S. 86, 97;

Seaboard Air Line Ry. Co. v. Duvall, 225 U. S. 477, 487;

Chesapeake & Ohio Ry. Co. v. McDonald, 214 U. S. 191, 193;

El Paso & S. W. Ry. Co. v. Eichel, 226, U. S. 590, 597, 598.

Louisville & N. Ry. Co. v. Smith, 204 U. S. 551, 556;

Thomas v. Iowa, 209 U. S. 258, 263;

Harding v. Illinois, 196 U. S. 78, 86;

Clarke v. McDade, 165 U. S. 168, 172;

Miller v. Cornwell Ry. Co., 168 U. S. 131, 134;

Sayward v. Denny, 158 U. S. 180, 183, 184.

In **Seaboard Air Line Ry. Co. v. Duvall**, 225 U. S. 477, at page 487, this Court hold:

"It is the duty of counsel asking in the State Court for the particular construction of a federal statute involving the case to put the request in such definite terms that the record will show that it was a claim of federal right specially set up as required by Section 709, in order to give this Court jurisdiction."

In **Chesapeake & Ohio Ry. Co. v. McDonald**, 214 U. S., at page 193, it is said:

"It is well settled that this Court, on error to a State Court, cannot consider an alleged federal question when it appears that the federal right thus relied upon had not been by adequate specification called to the attention of the State Court, and had not been by it considered, not being necessarily involved in the determination of the cause."

In **Waters-Pierce Oil Co. v. Texas**, 212 U. S. 112, at p. 115, this Court say:

"It is well settled in this Court that a review of the judgment of a State Court is confined to the Assignments of Error made and passed upon in the judgment of the State Court brought here for review." The Assignments of Errors in this Court cannot bring into the record any new matter for our consideration." Citing, "**Harding v. Illinois**, 196 U. S. 78."

And the syllabus of the Court in this case at page 86 is as follows:

"The jurisdiction of this Court under Sec. 709 Rev. Stat. to review the proceedings of the State Court is limited to specific instances of denials of federal right specifically set up in and denied by the State Court."

In *Thomas v. State of Iowa*, 209 U. S. 258, this Court hold:

"In order to give this Court jurisdiction under Sec. 709, Rev. Stat. to review the judgment of a State Court the federal question must be distinctly raised in the State Court and a mere claim which amounts to no more than a vague and inferential suggestion that a right under the constitution of the United States had been denied is not sufficient."

The Assignments of Error set out by plaintiff in error in the case at bar, on its appeal from the Trial Court to the State Supreme Court of Oklahoma are 26 in number, and are embodied literally in the Assignments of Error, in this Court, which are numbered from I to XXVI, inclusive (Appendix pages 3-11).

In none of these 26 Assignments of Error from the Trial Court to the State Supreme Court is the Federal Employer's Liability Act, or any other Federal Act, specified or in any manner referred to, and in none of these 26 Assignments of Error to the State Supreme Court is there any claim by plaintiff in error of any right, privilege or immunity under any Federal Act.

Even the requested instructions above considered, which were refused by the Trial Court, and which are the basis of the only Assignments of Error to the State Supreme Court, which it could even be claimed related to any Federal Act, are each and all of them obviously too vague general and indefinite to indicate or specify any claim of right privilege or immunity under any particular Federal Statute within the meaning of the cases above cited.

It is true that plaintiff in error in the case at bar, in its Brief in the State Supreme Court, sought to make a federal question by arguing that this action should have been brought under the Federal Employer's Liability Act. But there was

no Assignment of Error specific enough to warrant such argument.

It is also true that in the Opinions of the State Supreme Court it is held specifically that this action was properly brought under the State Statute and that the Federal Employer's Liability Act does not apply. But both Opinions of the State Supreme Court show conclusively on their face that no federal question was considered or decided, but that its holding, that the Federal Act does not apply, is based solely on the "finding of fact" as made by the State Supreme Court, *that West was not an employe of the Railroad Company*. In other words, by its "*findings of fact*" the State Supreme Court in this case denied the existence of facts necessary for any application of the Federal Employer's Liability Act in this case, and hence the existence of any federal question.

ANALYSIS OF ASSIGNMENTS OF ERROR IN THIS COURT.

Plaintiff in error has made and filed in this Court fifty-six Assignments of Error, numbered from I to LVI respectively.

The first 26 of these Assignments of Error are, as before seen, merely a repetition of the Assignments of Error made by it on Appeal from the Trial Court to the State Supreme Court, and which have already been considered. In none of them is the Federal Employer's Liability Act specified or mentioned, and in none of them is there set up or claimed any right, privilege or immunity under any particular Federal Statute as provided by Section 237 of the "Judicial Code," Act of March 3, 1911," (Sec. 709, Rev. Stat. of the U. S.)

The remaining 30 Assignments of Error, viz: Assignments numbered XXVII to LVI inclusive, are assignments by plaintiff in error of alleged errors of the Supreme Court of Oklahoma.

Of these 30 Assignments, numbers XLIX and L relate to the excluding of Exhibits "A," "B" and "C", and involve no federal claim. Number LII relates to the holding of the State

Supreme Court that the damages awarded in this case are not excessive, and involves no federal question. Each and all of the remaining assignments, (except XXVII and XXVIII which are general) viz: numbers XXIX to XLI inclusive, XLIII to XLVII inclusive, LI, and LIII to LVI inclusive, all are assignments specifically or indirectly predicated upon alleged error on the part of the Supreme Court of Oklahoma in finding from the Pleadings and from the evidence that West, the deceased, at the time of his death, was solely an employee of the American Express Company, and was not an employee of the Railroad Company, the plaintiff in error. In two only of the 56 Assignments of Error in this Court (but in none of those in the State Court) viz: XLII and LVI, is a claim made by plaintiff in error, under the Federal Employer's Liability Act. And in these two Assignments of Error, the claim is based on the assumption of fact by it, that West was an employee of the Railroad Company, directly contrary to the "finding of fact," of the State Supreme Court, in that regard.

[Note: There is no Assignment of Error number forty-eight in the record.]

But it is well settled that a federal question cannot be imported into the case by Assignments of Errors made for the first time in this Court, so as to thereby give this Court jurisdiction on writ of error.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 115.

And in *Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556, 575, it is said:

"An Assignment of Error cannot be availed of to import questions into a case which the record does not show were raised and passed on in the Court below."

II.

MOTION TO AFFIRM.

Under the decisions heretofore cited, it appears that this Court has not jurisdiction to affirm, but that the writ of error must be dismissed.

Eustis v. Bolles, 150 U. S. 361, 370.

However, if in the judgment of this Court, it has some jurisdiction herein, then the judgment of the State Court should be affirmed, on the ground that there is color for the motion to dismiss and that the writ of error was taken on frivolous grounds and for delay only.

Sire v. Elithorpe Air Brake Co., 137 U. S. 579;

Micar v. Williams, 104 U. S. 556, 557;

Richardson v. Louisville, etc. Ry. Co., 169 U. S. 128, 132.

SUMMARY.

The writ of error should be dismissed or the judgment affirmed, for three separate and distinct reasons, any one of which would be sufficient:

First: On the ground that this action could not have been brought under the Federal Employer's Liability Act, the highest Court of the State of Oklahoma having found as a fact in the case, that the deceased was not an employe of the Railroad Company, plaintiff in error, and said finding being supported by the Record.

This Court will not question this finding of fact, (the same having support in the Record,) and under it, no federal question is, or could be, involved, and hence this Court has not jurisdiction by writ of error.

Second: On the ground that by reason of its Findings of Fact, that the deceased was not an employe of the Railroad Company, the State Supreme Court of Oklahoma did not consider or decide, and was not required to consider or decide, any federal question. Hence, no federal question is before this Court, and this Court has not jurisdiction by writ of error.

Third: On the ground that plaintiff in error did not plead the Federal Employer's Liability Act, or sufficient facts to invoke the application of that Act, and did not specifically set up or claim any right, privilege or immunity under or by reason of that Act, or of any Federal Act, either in the Trial Court, or by sufficient Assignment of Errors in the State Supreme Court.

That the Findings of Fact of the State Supreme Court have support in the Record and that said Court did not consider or decide any federal question, conclusively appears from the face of the Opinions of the State Supreme Court.

By the numerous Amended Answers and Demurrers interposed by plaintiff in error and by its Application for Rehearing in the State Supreme Court and by its procurement of the writ of error herein, recovery has been delayed for more than five years since the beginning of this action.

It is obvious that the writ of error is based on frivolous grounds, and that it was taken for the purpose of delay only.

Plaintiff in error has not ordered a printed Record herein, and to avoid still further delay in reaching the regular calendar, the defendant in error has been required to print portions of the Record for the purpose of the motions here involved.

It is manifest that the propositions considered in this Brief come properly before this Court on the motions to dismiss or affirm.

It is further manifest, that there would be nothing further for this Court to consider were the case reserved for argument on the regular calendar.

It is respectfully submitted, that the writ of error should be dismissed or the judgment of the State Courts affirmed, with double costs and damages for delay, under Section 1010 Rev. Stats. and paragraph 2 of Rule 23 of this Court.

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APPENDIX.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, NATIONAL
SURETY COMPANY and AMERICAN SURETY COMPANY OF NEW
YORK,

Plaintiffs in Error,

vs.

IVOLUE B. WEST,

Defendant in Error.

PETITION FOR WRIT OF ERROR.

Come now the above named Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, plaintiffs in error, and say that on the 9th day of April, 1910, a judgment was rendered in the District Court within and for the Third Judicial District, Muskogee county, State of Oklahoma, against the plaintiff in error, Missouri, Kansas & Texas Railway Company, for fifteen thousand (\$15,000.00) dollars in favor of the defendant in error, Ivolue B. West; that pursuant to the civil statutes of the State of Oklahoma said cause was appealed to the Supreme Court of the State of Oklahoma where, on the 2nd day of June, 1912, this court handed down its opinion affirming the judgment of the trial court; that thereafter, pursuant to the civil statutes of the State of Oklahoma, and on the 26th day of June, 1912, a petition for re-hearing was filed, presented, considered, and on the 4th day of February, 1913, granted by this court and thereafter, and on the 8th day of August, 1913, this court handed down the opinion on re-hearing affirming the judgment of the trial court, which judgment thereupon became final; that the Supreme Court of the State of Oklahoma is the highest court in said state in which a decision in this action could be had; that these plaintiffs in error, the said Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, were and are aggrieved in that,

in said judgment and proceedings had prior thereto in this case, certain errors were committed to their prejudice; that this is an action brought by the defendant in error Ivolue B. West, as the widow of William B. West, deceased, for damages for his death alleged to have been caused through the negligence of the plaintiff in error, Missouri, Kansas & Texas Railway Company and its servants; that this plaintiff in error, Missouri, Kansas & Texas Railway Company is, and was, at the time of the injuries resulting in the death of the said William B. West, a common carrier by railroad, engaged in interstate commerce, and the deceased, William B. West, at the time of the injuries resulting in his death, employed by the plaintiff in error, Railway Company, in such commerce, being employed as baggageman, and was, at the time, handling interstate baggage upon a train of the plaintiff in error, Railway Company, which was at the time engaged in moving interstate traffic; and plaintiffs in error, therefore, contended, and still contend, in said action that defendant in error had no right to maintain this suit, but that same could only be maintained by the personal representative of the deceased, as contemplated by the Act of Congress approved April 22, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," and that by this action there is, therefore, drawn in question the construction of said statute, and the decision of this court is against the right claimed by these plaintiffs in error to insist that said action should have been so brought, and is, as it believes, contrary to the said statute of the United States relating to actions for the death of persons while in the employ of common carriers by railroad and engaged in commerce between the several states, as contemplated by said Act; that in said action rights, privileges and immunities were claimed by your petitioners under the constitution of the United States, and under authority exercised under the United States, and the decision of the said Supreme Court of the State of Oklahoma was against the rights, privileges and immunities especially set up and claimed under said constitution, statute and authority; all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, said plaintiffs in error pray that a writ of error may issue to the Supreme Court of the State of Oklahoma for the correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

JOSEPH M. BRYSON,
CLIFFORD L. JACKSON,
WILLIAM R. ALLEN,
MAURICE D. GREEN,
Attorneys for Plaintiffs in Error

IN THE SUPREME COURT OF THE UNITED STATES.

(Title of Cause.)

No. 696.

ASSIGNMENTS OF ERROR.

Come now the Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, plaintiffs in error in the above entitled cause, and aver and show that in the foregoing record and proceedings in said cause there is manifest error in the action and rulings of the District Court, within and for the Third Judicial District, Muskogee county, State of Oklahoma, as well as in the action, rulings and opinion of the Supreme Court of the State of Oklahoma, in this, to-wit:

I.

The trial court erred in overruling the objection of the plaintiff in error, Missouri, Kansas & Texas Railway Company, to the introduction of any evidence in the case and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

II.

The trial court erred in refusing to admit in evidence, the application for a situation of William B. West with the American Express Company, which application contained the accident release executed by the said William B. West, the benefits of which inured to the plaintiff in error, Missouri, Kansas & Texas Railway Company. Said application for situation and accident release executed by the said William B. West being marked "Defendant's Exhibit A," and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

III.

The trial court erred in refusing to admit in evidence the application for a situation of William B. West with the American Express Company, which application contained the accident release executed by the said William B. West, the benefits of which inured to the plaintiff in error, Missouri, Kansas & Texas Railway Company. Said application for situation and accident release being marked "Defendant's Exhibit B," and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

IV.

The trial court erred in refusing to admit in evidence the application for a situation of William B. West, with the American Express Company, which application contained the accident release executed by the said William B. West, the benefits of which inured to the plaintiff in error, Missouri, Kansas & Texas Railway Company. Said application for situation and accident release being marked "Defendant's Exhibit C," and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

V.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

"(1) The court instructs the jury to find the issues in favor of the defendant."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

VI.

The trial court erred in instructing the jury as follows, to-wit:

"(1) You are instructed that this action is brought by the plaintiff as the widow of William B. West, for the benefit of herself as such widow and of the minor children of herself and of said William B. West, deceased, for the alleged negligent killing of her husband while he was running upon one of the defendant's trains as an express messenger in the employ of the American Express Company.

Plaintiff alleges that at and prior to the time of the death of said William B. West, he was employed by the American Express Company as a messenger, upon the express cars operated by the defendant company over its line of railroad between Parsons, Kansas, through the State of Oklahoma to points beyond in the State of Texas. That in addition to his duties as express messenger said West was also engaged in handling passenger baggage upon the express cars of the defendant company. That on May 15, 1908, at about 12 o'clock noon, of said day, said William B. West, in the course of his employment, was riding in one of the express cars of the defendant company, then being operated by defendant over its railroad in a southerly direction, though the state of Oklahoma, upon its train known as the 'Katy Flyer.' That when said train reached a short distance south of the Arkansas river between

the stations of Verdard and Muskogee, said train, through gross carelessness and negligence upon the part of the railroad company, and while said train was running at a high and dangerous rate of speed, caused and allowed to collide in a head end collision with a locomotive and freight train, also owned and operated and maintained by said defendant company and which freight train was also through the gross carelessness and negligence of said defendant company being run and operated by said defendant company upon the same track, in a northerly direction, at a high and dangerous rate of speed; and that the said William B. West was by said collision and by the gross carelessness and negligence on the part of the defendant and without any fault or neglect upon his part was then and there caused to sustain and receive personal injuries which resulted in his immediate death. Plaintiff brings suit in the sum of \$50,000.00 for said killing.

The defendant has filed an answer, which after denying each and every material allegation in plaintiff's petition, avers that if the said William B. West was injured and killed at the time, place, and in the manner alleged, his death was not due to any negligence on the part of the defendant, or any of its servants, agents or employes, but was due solely to the negligence on the part of the said William B. West. Defendant further alleges in its answer that the defendant, before entering into the service of this company had executed two certain contracts to the American Express Company by which claim for damages for injuries were waived and released and in which contract he agreed to release any railroad on which he might be working at the time of any injury, and that the plaintiff is now barred from maintaining this action."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

VII.

The trial court erred in instructing the jury as follows, to-wit:

"(2) You are further instructed that the jury are the sole judges of the weight of the testimony and credibility of the witnesses, but the law of the case is that which is given to you by the court in these instructions, and you are to be governed by no other law. In determining the weight of the testimony and credibility of the witnesses, you have the right to look to each witness as he conducted himself while upon the witness stand, to his fairness or lack of fairness, to his intelligence or his incapacity, as the same appeared to you, to his interest in the case, if any, and you have the right to look to each and every surrounding circumstance that appears in the testimony.

If there is a conflict between the different parts of the testimony of any witness, it is your duty to reconcile the same, if this can be done, upon the theory that each witness has spoken the truth; but if this cannot be done then you may disregard any part of the testimony of any witness, or all of his testimony, as you may see fit under the surrounding facts and evidence in the case. If you believe from the evidence that any witness has wilfully testified falsely to any fact material to the issue in this case, then you are at liberty to disregard any part or the whole of the testimony of such witness." and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

VIII.

The trial court erred in instructing the jury as follows, to-wit:

"(3) The burden is upon the plaintiff to sustain her contention by a preponderance of the testimony. By this is meant the greater weight of the testimony, and not necessarily the number of witnesses testifying upon the one side or the other." and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

IX.

The trial court erred in instructing the jury as follows, to-wit:

"(4) You are instructed that it is the duty of a railway company to so conduct, maintain and run its trains used in its business in such a manner as to prevent injury to persons riding on said trains."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

X.

The trial court erred in instructing the jury as follows, to-wit:

"(4½) By 'ordinary care' as that term is used in these instructions, is meant that degree of care which a person of reasonable prudence and caution would likely use and exercise under the same or similar circumstances and conditions, and a failure to use such care is negligence on the part of the person or corporation guilty of such failure. That is to say, negligence is the failure to do or perform some act or the doing of some act which, from the nature of the act and under the circumstances, may result in injury or damage to the person or

property of others, and which a person of reasonable prudence would or would not do, as the case may be, under the same or similar circumstances, and the rule here stated, applies equally to persons and corporations, the latter, that is corporations being chargeable with the negligence, if any, committed by their officers, agents and employes in the discharge of their duty as such."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XI.

The trial court erred in instructing the jury as follows, to-wit:

"(5) 'Now bearing in mind these instructions and applying them carefully to the evidence before you, if you believe and find from a preponderance of the testimony that on or about the 15th day of May, 1908, in the County of Muskogee, William B. West was personally injured by being in a wreck caused by a collision between the 'Katy Flyer' and one of defendant's freight trains on its line of railroad south of the Arkansas River bridge, and you further find that such injury was the direct or proximate result of the negligence of the defendant, its agents, officers, or employes to properly conduct and run its trains on said railroad track; that is if you so find and believe that the injuries sustained by William B. West was the direct or proximate result of the failure of defendant, its officers, agents or employes to exercise that degree of diligence and care to prevent injury to others as a person of ordinary caution and prudence would likely have used under the same or similar circumstances, and you further find that such injury caused the death of the said William B. West, then it will be your duty to return a verdict in favor of the plaintiff herein for such sum, as, in your judgment, the evidence shows her to be entitled to under other instructions given you in this case.'"

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XII.

The trial court erred in instructing the jury as follows, to-wit:

"(6) If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and determining this, you may consider the probable earnings of the de-

ceased, his age, experience, habits, health, and bodily qualifications, during what probably would have been his lifetime if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition."

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XIII.

The trial court erred in instructing the jury as follows, to-wit:

"(7) Nine of the jury concurring is sufficient to return a verdict for plaintiff or defendant and if the verdict is rendered by nine or more, but by less than the whole number of jurors, then the jurors who concur in the verdict must sign their names thereto. If the verdict is concurred in by the entire jury, then you will select some one of your number foreman and have him sign the verdict as such foreman and return it into court." and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XIV.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

"(2) If you find from the evidence in this case that the deceased, W. B. West, was not an employe of the defendant, then the defendant would not be liable unless you should further find that the defendant was guilty of gross negligence and that as a result of such negligence the deceased was killed." and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XV.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

"(3) If you find from the evidence in this cause that the said W. B. West was employed by the defendant as baggage master and was acting as such at the time of his death you will find the issues in favor of the defendant." and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XVI.

The trial court erred in refusing to instruct the jury as re-

quested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

"(4) If you find from the evidence in this cause that the deceased W. B. West was an employe of the defendant, at the time he received the injuries which caused his death, and that as such employe he was engaged in interstate commerce, as hereafter explained, then the laws of the United States would govern the liability of the defendant herein." and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XVII.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

"(5) If you find from the evidence in this action that the deceased W. B. West at the time he received the injuries which caused his death was not an employe of the defendant, and if you further find that the deceased W. B. West entered into the contract introduced in evidence stipulating for a release of the defendant, then your verdict should be for the defendant." and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XVIII.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

"(6) If you find from the evidence that the train upon which West was working at the time of his death engaged in commerce between the states and that he was an employe of the defendant, the plaintiff is not entitled to recover." and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XIX.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

"(7) If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained and you are not to permit your sympathy to influence your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental

anguish—your verdict must be based upon the financial loss in dollars and cents.”

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XX.

The trial court erred in refusing to instruct the jury as requested by the plaintiff in error, Missouri, Kansas & Texas Railway Company, as follows, to-wit:

“(8) If you find for the plaintiff your verdict must not exceed ten thousand dollars.”

and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXI.

The trial court erred in overruling the objection of the plaintiff in error, Missouri, Kansas & Texas Railway Company, to the making and rendering of the verdict rendered by the jury in this cause, and the Supreme Court of Oklahoma erred in not correcting this error of the trial court.

XXII.

The trial court erred in refusing to set aside the verdict in this case and to award the plaintiff in error, Missouri, Kansas & Texas Railway Company, a new trial because the damages awarded by the jury were excessive and appear to have been given under the influence of passion and prejudice, and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXIII.

The trial court erred in overruling the motion of the plaintiff in error, Missouri, Kansas & Texas Railway Company, for a new trial, and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXIV.

The trial court erred in refusing to grant to the plaintiff in error, Missouri, Kansas & Texas Railway Company, a new trial, and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXV.

The trial court erred in refusing to render a judgment against the defendant in error and in favor of the plaintiffs in error, and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXVI.

The trial court erred in rendering judgment in favor of the defendant in error and against the plaintiffs in error and the Supreme Court of the State of Oklahoma erred in not correcting this error of the trial court.

XXVII.

The Supreme Court of the State of Oklahoma erred in not reversing the judgment of the trial court within and for the Third Judicial District, Muskogee county, State of Oklahoma, because of each of the several errors of the latter court as to its actions and rulings as to each and every one of the several errors above specified.

XXVIII.

The Supreme Court of the State of Oklahoma erred in affirming the judgment of the trial court within and for the Third Judicial District, Muskogee county, State of Oklahoma, in this cause, and in not correcting said errors and in not reversing said judgment of the said trial court.

XXIX.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the deceased, William B. West, was not an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company, at the time of the injury resulting in his death.

XXX.

The Supreme Court of the State of Oklahoma erred in holding that the deceased, William B. West, was employed exclusively by the American Express Company, at the time of the injury resulting in his death.

XXXI.

The Supreme Court of the State of Oklahoma erred in hold-

ing that William B. West, deceased, was an employe of the Express Company only and not of the Railway Company, the evidence being undisputed in this case that the said William B. West, deceased, was a joint employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company, and the American Express Company, and the parties to this cause in their pleadings and both parties and the trial court throughout the trial proceeding on the theory that West was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company, at the time of the accident resulting in his death.

XXXII.

The Supreme Court of the State of Oklahoma erred in holding in its opinion and judgment that under the issues as framed in this case, the said deceased, William B. West, was an employe of the said American Express Company, and not of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXIII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the petition of the defendant in error did not allege that the deceased, William B. West, was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXIV.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the answer of the plaintiff in error, Missouri, Kansas & Texas Railway Company, upon which the case was tried, did not allege that the deceased, William B. West, was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXV.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the reply of the defendant in error to the Answer of the plaintiff in error, Missouri, Kansas & Texas Railway Company, upon which the case was tried did not admit that the deceased, William B. West, was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXVI.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the pleadings of the defendant in error did not allege that William B. West, deceased, was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXVII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the pleadings of the plaintiff in error, Missouri, Kansas & Texas Railway Company, did not allege that William B. West, deceased, was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXVIII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the parties to this case did not join an issue of fact as to whether William B. West, deceased, was an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XXXIX.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that there were no averments in the pleadings in this case from which an inference might reasonably be drawn that a contract of employment was entered into between the deceased and the plaintiff in error, Missouri, Kansas & Texas Railway Company.

XL.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the rule

"That if, during the course of the trial, it develops that the real case is not controlled by the state statute but by a federal statute and the case is commenced under the former, the case pleaded is not proved and the case proved is not pleaded;" is not applicable to this case.

XLI.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the deceased, William B.

West, was a passenger upon the train of the plaintiff in error, Missouri, Kansas & Texas Railway Company, at the time of his injury, resulting in his death.

XLII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the Act of Congress of April 22nd, 1908, 35 U. S. Statutes at Large, page 65, entitled, "An Act relating to liability of common carriers by railroad to their employes in certain cases" does not apply to and control the question of the liability of the plaintiff in error, Missouri, Kansas & Texas Railway Company, on account of the injuries resulting in the death of the said William B. West.

XLIII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that Sections 5945 and 5946 of the Compiled Laws of the State of Oklahoma of 1909, Snyder, as modified by Section 7, Article 23, of the Constitution of the State of Oklahoma, govern this case.

XLIV.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that Section 2907 of the Compiled Laws of Oklahoma, 1909, Snyder, applies to this case.

XLV.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that this action could be properly brought or maintained under the laws of the State of Oklahoma.

XLVI.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that Section 7, Article 23, of the Constitution of the State of Oklahoma defines the rights of the defendant in error as to any matters involved in this case.

XLVII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that Section 8, Article 23, of

the Constitution of the State of Oklahoma applies to any matters involved in this case.

XLIX.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the said contracts offered in evidence, being the applications of the deceased, William B. West, for situations with the said American Express Company, which said applications contain the accident releases executed by said William B. West, the benefits of which inured to the plaintiff in error, Missouri, Kansas & Texas Railway Company, and marked "Defendant's Exhibits A, B and C," respectively, and each of them, are void on account of being in contravention of the laws of the State of Kansas and of the Constitution of the State of Oklahoma.

L.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that it was not clear that the contracts offered in evidence, being the plaintiff in error, Missouri, Kansas & Texas Railway Company's, Exhibits A, B, and C, and each of them, covered the employment in which the deceased, William B. West, was engaged at the time of his death and that this would be a sufficient ground for refusing to admit them in evidence.

LI.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the evidence in this case as to the employment of William B. West by the plaintiff in error, Missouri, Kansas & Texas Railway Company was not sufficient to take the case to the jury on the question of such employment.

LII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in holding that the amount of damages awarded in this case was not excessive.

LIII.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment wherein it stated that

"From a careful investigation of the entire record, we are persuaded that if we should reverse the judgment of the court

below upon the ground that the deceased suffered the injuries which resulted in his death while he was employed by the railway company, we would compel the widow to abandon the tenable theory upon which she brought the case and to accept one less advantageous to her and her children and one which it would be difficult, if not impossible, to establish."

LIV.

The Supreme Court of the State of Oklahoma erred in affirming the judgment of the trial court in this case as it is shown from said opinion of said Supreme Court of the State of Oklahoma in that it asserted as a reason for affirming said judgment of the trial court the following:

"From a careful investigation of the entire record, we are persuaded that if we should reverse the judgment of the court below upon the ground that the deceased suffered the injuries which resulted in his death while he was employed by the railway company, we would compel the widow to abandon the tenable theory upon which she brought the case and to accept one less advantageous to her and her children and one which it would be difficult, if not impossible, to establish."

LV.

The Supreme Court of the State of Oklahoma erred in its opinion and judgment in denying and in not giving to the plaintiff in error, Missouri, Kansas & Texas Railway Company, its rights under the Constitution, Statutes and Laws of the United States with reference to interstate commerce, for the reason that the plaintiff in error, Missouri, Kansas & Texas Railway Company is, and was at the time of the injuries resulting in the death of the said William B. West, a common carrier by railroad, engaged in interstate commerce, and the deceased, William B. West, was, at the time of the injuries resulting in his death, employed by the plaintiff in error, Missouri, Kansas & Texas Railway Company, in such commerce being employed as baggageman, and was at the time handling interstate baggage upon a train of the plaintiff in error, Missouri, Kansas & Texas Railway Company, which was engaged in moving interstate traffic.

LVI.

The Supreme Court of the State of Oklahoma erred in denying and in not giving to this plaintiff in error, Missouri, Kansas & Texas Railway Company, rights and immunities set up

and claimed by said plaintiff in error under and by virtue of the Act of Congress approved April 22nd, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," found at page 65 of Vol. 35, U. S. Statutes at Large, which rights and immunities so claimed, were as follows: This is an action brought by the defendant in error, who is the widow of the said William B. West, deceased, and brought by her for herself and minor children, but not in a representative capacity, and she had not been appointed personal representative of the estate of the said William B. West, and the pleadings and admitted facts show that the said William B. West, met his death while engaged as an employe of the plaintiff in error, Missouri, Kansas & Texas Railway Company, in interstate commerce, the said West acting as baggageman for said plaintiff in error, Missouri, Kansas & Texas Railway Company, between the points of Parsons, in the State of Kansas, through Oklahoma, and to Dallas, in the State of Texas, this said plaintiff in error, Missouri, Kansas & Texas Railway Company, being engaged as common carrier by railroad in interstate commerce at the time of the accident resulting in the death of the said William B. West, and under the provisions of said Act of Congress, the defendant in error had no right of action, and this action could not be maintained, but notwithstanding this Act of Congress, the Supreme Court of the State of Oklahoma held she could maintain the action.

Wherefore, for these and other manifest errors appearing in the record, the said Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, plaintiffs in error, pray that the said judgment of the said Supreme Court of the State of Oklahoma be reversed, set aside, and held for naught, and that judgment be rendered for the plaintiffs in error, granting to them their rights under the statutes and laws of the United States, and the said plaintiffs in error also pray judgment for their costs.

JOSEPH M. BRYSON,
CLIFFORD L. JACKSON,
WILLIAM R. ALLEN,
MAURICE D. GREEN,
Attorneys for Plaintiffs in Error.

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA.
No. 1928.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, NATIONAL
SURETY COMPANY and AMERICAN SURETY COMPANY OF NEW
YORK,

Plaintiffs in Error,

VS.

IVOLUE B. WEST,

Defendant in Error.

ORDER ALLOWING WRIT OF ERROR.

Now on this 11th day of August, 1913, come the Missouri, Kansas and Texas Railway Company, National Surety Company and American Surety Company of New York, Plaintiffs in Error, and file and present to this Court their petition praying for the allowance of a writ of error intended to be urged by them; and praying further that a duly authenticated transcript of the record, proceedings and papers, upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this Court desiring to give petitioners an opportunity to test in the Supreme Court of the United States the questions therein presented, it is ordered by this Court that writ of error be allowed as prayed; provided, however, that the said Missouri, Kansas & Texas Railway Company, National Surety Company and American Surety Company of New York, Plaintiffs in Error, give bond, according to law, in the sum of thirty thousand (\$30,000.00) dollars, which said bond shall operate as a supersedeas bond.

In Testimony Whereof, witness my hand this 11th day of August, 1913.

SAMUEL W. HAYES,
Chief Justice of the Supreme Court
of the State of Oklahoma.

(Seal)

Attest:

W. H. L. Campbell, Clerk.
By Jessie Pardoe, Deputy.

Endorsed: In the Supreme Court of the State of Oklahoma—No. 1928—Missouri, Kansas & Texas Railway Company, et al., Plaintiffs in Error, vs. Ivolue B. West, Defendant in Error.—Order allowing writ of error. Filed August 11, 1913. W. H. L. Campbell, Clerk.

WRIT OF ERROR.

UNITED STATES OF AMERICA, ss.

The President of the United States to the Honorable, the Justices of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma, or before you, or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between Missouri, Kansas and Texas Railway Company, as Plaintiff in Error, and Ivolue B. West, as Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or on an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said Missouri, Kansas and Texas Railway Company, National Surety Company and American Surety Company of New York, Plaintiffs in Error, as by their complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause

further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this eleventh day of August, in the year of our Lord, One Thousand, Nine Hundred Thirteen.

Done in the City and County of Oklahoma, State of Oklahoma, with the seal of the District Court of the United States for the Western District of the State of Oklahoma attached.

(Signed) ARNOLD C. DOLDE,
Clerk of the District Court of the United
States for the Western District of the
State of Oklahoma.

(Seal)

Allowed by:

SAMUEL W. HAYES,
Chief Justice of the Supreme
Court of Oklahoma.

I hereby certify that a copy of the within writ of error was, on the 11 day of August, 1913, lodged in the Clerk's Office of the said Supreme Court of the State of Oklahoma by the Plaintiffs in Error for the Defendant in Error.

(Signed) W. H. L. CAMPBELL,
Clerk of the Supreme Court of the
State of Oklahoma.

By JESSIE PARDOE,

(Seal)

Deputy.

Endorsed: In the Supreme Court of the United States, Missouri, Kansas and Texas Railway Company, et al., Plaintiffs in Error, vs. Ivolue B. West, Defendant in Error. Writ of Error. Filed August 11th, 1913. W. H. L. Campbell, Clerk.

PLEADINGS.

IVOLUE B. WEST,

Plaintiff,

vs.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, a corporation,

Defendant.

 PETITION.

Plaintiff complains of defendant and alleges:

That defendant now is and during all the times herein mentioned has been a railroad corporation, duly created, organized, and existing under and by virtue of the laws of the State of Kansas, and as such, during all of said times, has been engaged in the railroad business in the States of Kansas and Oklahoma and elsewhere as a common carrier of freight, express, and passengers for hire.

That during all the times herein mentioned, said defendant corporation, as a part of its said railroad business, owned and was engaged in operating a certain line of railroad, extending from St. Louis, Missouri, southerly to Parsons, Kansas, and thence from Parsons, Kansas, southerly to the stations of Verdard and Muskogee in the State of Oklahoma, and thence southerly through the State of Oklahoma to points in the State of Texas, over which line of railroad said defendant, during all the times herein mentioned was actually engaged in carrying and transporting freight, express and passengers for hire by trains of cars drawn by steam locomotives by it owned, operated and maintained. That said line of railroad consisted of what is known as a single track line and was and is of the usual form of construction, and by said defendant, owned and maintained.

That William B. West, deceased, hereinafter named, left him surviving, as his only heirs at law, the plaintiff herein, his widow, who is thirty-six (36) years of age, and three minor children whose names and ages are as follows, viz: Norma H. West, aged sixteen; Glenford B. West, aged seven years, and Wilmetta M. West, aged two years, and also a posthumous child, born June 29, 1908.

That this action is brought by the plaintiff as widow of said William B. West, and for the benefit of herself, as such widow, and of said minor children of herself and of said William B. West, deceased.

That said William B. West, at the time of his death, as hereinafter set out, was, and for many years prior thereto had been a resident of the County of Labette, in the State of Kansas, and that plaintiff during all the times herein mentioned, has been and still is a resident of said county, and that no personal representative of the estate of said William B. West, deceased, has been appointed.

That at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company, as express messenger upon the express cars operated by said defendant company, over its said line of railroad between said city of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas.

That in addition to his duties and employment as express messenger, as aforesaid, said William B. West also engaged in handling passenger baggage upon the express cars of said defendant company.

That on May 15, 1908, at about twelve o'clock noon of said day, said William B. West, in the course of his employment as hereinbefore set out, was riding in one of the express cars of said defendant company, attached to one of the regular trains of said defendant company, being then and there run and operated by said defendant company, over said railroad line in a southerly direction through the State of Oklahoma, which train was one of the regular passenger trains of said defendant, known as "Number Five," and also known as the "Katy Flyer"; and that when said train reached a point in said State of Oklahoma, a short distance southerly of the Arkansas river, between the said stations of Verdard and Muskogee in said State of Oklahoma, said train upon which said William B. West was so riding in the performance of his duties as aforesaid, was by said defendant railroad corporation, through gross carelessness and negligence, upon its part, and while said train was running at a high and dangerous rate of speed, caused and allowed to collide in what is known as a head end collision with a locomotive and freight train, also owned, maintained, and operated by said defendant company, and which freight train was also then and there, through the gross carelessness and negligence of said defendant company, being run and operated, by said defendant company upon the same track, in a northerly direction at a high and dangerous rate of speed and that said William B. West, was by said collision and by said gross carelessness and negligence on the part of said defendant railroad company, in causing and allowing said trains to be so run and operated upon the same track and to collide as aforesaid, and without any fault or neglect, whatsoever, upon the part of said William B. West, then and there caused to sustain

and receive such personal bodily injuries as resulted in his immediate death.

That the expectancy of life of said William B. West at the time of his death, according to the Carlisle tables of mortality, was twenty-nine and sixty-four one-hundredths years ($29\frac{64}{100}$), and that at the time of his death, as aforesaid, said William B. West was but thirty-eight years of age, and in good health of body and mind, and of strong physique and was well able to do great mental and manual labor, and to earn at least the sum of eighty-three and thirty-three one-hundredths dollars ($\$83.33/100$) per month, at his said business and employment as express messenger and baggageman as aforesaid, and that at said time was, in fact, actually earning and receiving from his said employment, the sum of eighty-three and thirty-three one hundredths dollars. ($\$83.33/100$) per month, and that he would (except for his death so resulting from the neglect of said defendant) have continued to earn and receive a much larger sum per month, for at least the period of twenty-nine years (29) thereafter, and in the aggregate, at least the sum of thirty thousand dollars ($\$30,000$), and that plaintiff herein, and her said children would have received for their own benefit, out of said moneys that said William B. West would have earned (except for his death as aforesaid) an amount, in excess of twenty-five thousand ($\$25,000$) and that plaintiff and her said children have been damaged at the hands of defendant in the loss of the care, aid, advice and society of said William B. West as husband of plaintiff and father of said children in the further sum of at least twenty-five thousand ($\$25,000$) dollars.

Wherefore, plaintiff demands judgment against said defendant in the sum of fifty thousand dollars ($\$50,000$) and for the costs and disbursements of this action.

S. GRANT HARRIS,
BENJ. MARTIN, JR.,

Attorneys for Plaintiff.

(Duly verified.)

(Title of Cause.)

DEMURRER.

Comes now the defendant and demurs to plaintiff's petition filed herein and for grounds of demurrer states:

I.

That the plaintiff has no legal capacity to sue for the minor children named in paragraph three of said petition.

II.

That there is a defect of parties plaintiff in this: that the suit is brought in the name of Ivolue B. West as plaintiff while in paragraph four of said petition it is stated that the suit was brought by the plaintiff for the benefit of herself and the minor children named in paragraph three of said petition.

III.

That the petition does not state facts sufficient to constitute a cause of action on behalf of plaintiff.

CLIFFORD L. JACKSON,
Attorney for Defendant.

ORDER OVERRULING DEMURRER.

Thereafter and on the 29th day of October, 1908, the demurrer of the defendant to the plaintiff's petition comes on for hearing before the Court, and after argument of counsel, the court being fully advised, overruled said demurrer and grants the defendant twenty days in which to answer, to which action of the court in overruling said demurrer, the defendant then and there excepts.

(Title of Cause.)

ANSWER.

Comes now the defendant and for answer to plaintiff's petition, denies each and every material allegation thereof.

Wherefore, having fully answered, defendant prays that it be adjudged to go hence without day with its costs in this behalf laid out and expended.

CLIFFORD L. JACKSON,
Attorney for Defendant.

(Title of Cause.)

FIRST AMENDED ANSWER.

Comes now the defendant and, by leave of court first had and obtained, for its first amended answer to the petition filed herein denies each and every material allegation thereof.

Further answering, defendant states that even if the said William B. West, deceased, was injured and killed at the time, place, and in the manner as alleged in the plaintiff's petition, but no part of which is admitted, but all of which is denied, that his said injuries and death were not due to any negligence on the part of this defendant or any of its agents, servants, or employes, but were due solely to negligence on the part of the said William B. West.

Further answering, defendant states that it is now, and was at all times mentioned in plaintiff's petition, a common carrier by railroad engaged in commerce between the several states, and that the passenger train described by plaintiff in said petition as the "Katy Flyer" was at all times mentioned therein, an interstate train, starting from St. Louis, in the State of Missouri, and passing into and through the States of Kansas and Oklahoma, and thence into the State of Texas, and at all times therein mentioned was engaged in the movement of interstate commerce, and defendant further states that the said freight train described in plaintiff's said petition was, on the said 15th day of May, 1908, a train starting from Muskogee, in the State of Oklahoma, and proceeding on its way over the defendant's line of railway to Parsons, in the State of Kansas, and was on said date, and at all times mentioned in plaintiff's petition, engaged in moving interstate commerce.

Wherefore, having fully answered, defendant prays that it be adjudged to go hence without day, with its costs in this behalf laid out and expended.

CLIFFORD L. JACKSON,
Attorney for Defendant.

(Title of Cause.)

REPLY TO FIRST AMENDED ANSWER.

Comes now the plaintiff herein and for reply to defendant's first amended answer filed herein denies each and every allegation thereof.

S. GRANT HARRIS,
BENJ. MARTIN, JR.,
Attorneys for Plaintiff.

(Title of Cause.)

SECOND AMENDED ANSWER.

(Omitting Exhibit "A," it being substantially the same as Exhibit "B.")

Comes now the defendant and by leave of court first had and obtained, for its second amended answer to the petition filed herein denies each and every material allegation thereof.

Further answering, defendant states that even if the said William B. West, deceased, was injured and killed at the time, place, and in the manner as alleged in the plaintiff's petition, but no part of which is admitted, but all of which is denied, that his said injuries and death were not due to any negligence on the part of this defendant or any of its agents, servants, or employes, but were due solely to negligence on the part of the said William B. West.

Further answering, defendant states that it is now, and was at all times mentioned in plaintiff's petition, a common carrier by railroad engaged in commerce between the several states, and that the passenger train described by plaintiff in said petition as the "Katy Flyer" was at all times mentioned therein, an interstate train, starting from St. Louis, in the State of Missouri, and passing into and through the States of Kansas and Oklahoma, and thence into the State of Texas, and at all times therein mentioned was engaged in the movement of interstate commerce, and defendant further states that the said freight train described in plaintiff's said petition was, on the said 15th day of May, 1908, a train starting from Muskogee, in the State of Oklahoma, and proceeding on its way over the defendant's line of railway to Parsons, in the State of Kansas, and was, on said date, and at all times mentioned in plaintiff's petition, engaged in moving interstate commerce.

Further answering, defendant states that prior to the time of the alleged injury in question, the said William B. West had made application to the American Express Company in writing for employment by it as driver of one of its wagons at Parsons, Kansas, and was so engaged pursuant to the terms of a written contract, said contract being dated January 9, 1893, a copy of which contract is hereto attached marked Exhibit "A," and made a part of this answer.

Further answering, defendant states that prior to the time of the alleged injury in question the deceased, William B. West, had made application to the said American Express Company in writing for employment by it as an express messenger, and that in pursuance of said application he was prior to and at the time of the alleged injury in question employed

by the said American Express Company under a contract in writing between him and said Company, which contract was dated October 15, 1896, a copy of which is hereto attached, marked Exhibit "B," and made a part hereof, and which said contract includes as part of its provisions the contract hereinabove referred to and marked Exhibit "A."

Further answering defendant states that by the terms of said contract hereinabove identified as Exhibit "B," it was provided that in consideration of the premises and of the employment of deceased, he did assume all risk of accident and injury which he should meet with or sustain in the course of his employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employe of any such corporation or person, or otherwise, and whether resulting in his death or otherwise.

Further answering, defendant states that by the terms of said contract it was provided that in case of any injury suffered by deceased, he would at once, without demand, and at his own expense execute and deliver to the corporation or person owning or operating the railroad, stage or steam-boat line upon which he should be so injured, a good and sufficient release under his hand and seal of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom.

Further answering, defendant states that by the terms of said contract it was provided that the deceased ratified all agreements theretofore made by said Express Company with any corporation or person operating a railroad, stage and steamboat line in which such express company had agreed in substance, that its employes should have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and deceased further agreed to be bound by each and every of such agreement insofar as to provisions thereof relative to injury sustained by employes of the company were concerned as fully as if he were a party thereto.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did thereby authorize and empower said express company at any time while he should remain in its service to contract for him and in his behalf in its own name or in his name, with any corporations or persons operating a railroad, stage or steamboat line, for his transportation as a messenger or employe, free of charge, upon the condition and consideration that neither he nor his personal representatives, nor any person claiming under him would make any claim for compensation because of any injury sustained by him, whether resulting on the gross negligence

of such corporations or persons, or any employes of such corporations or persons or otherwise, and the contract so made should be as binding and obligatory upon him as if signed and delivered by him.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did agree that the provisions of said contract should be held to inure to the benefit of any and every corporation and to all persons upon whose railroad, stage or steam-boat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did agree that in consideration of his employment by said Express Company that he would assume all risks of accident or injury which he should meet with or sustain in the course of such employment, whether occasioned by negligence of said company or any of its members, officers, agents or employes, or otherwise.

Further answering, defendant states that at the time of the alleged injury in question the deceased was in the express car being transported by this defendant over its said line of railway and was in said car in pursuance of said contract hereinabove referred to as Exhibit "B," and states that plaintiff is, therefore, now barred from maintaining this action.

Wherefore, having fully answered, defendant prays that it be adjudged and go hence without day, with its costs in this behalf laid out and expended.

CLIFFORD L. JACKSON,
Attorney for Defendant.

* * * * *

Exhibit "A" is omitted, it being substantially the same as Exhibit "B."

EXHIBIT "B."

(Omitting formal parts as not material on the Motions.)

AMERICAN EXPRESS COMPANY

Application for Situation.

Rules governing employment by this Company.

Any person desirous of engaging in the service of this Company must, before appointment, personally fill out and execute this form of Application, obtain satisfactory Life Insurance (unless already insured), and, if required, enter into bonds with the Company for the faithful discharge of his duties, as per conditions fixed by the Company and in force at date of his employment or as may be fixed from time to time thereafter and made applicable in any renewal of Bond during his employment by Company, and which conditions he is required to inform himself upon. Parties appointed to represent this Company, and engaged in other business, are not expected to comply with these rules unless they wish to do so.

Persons employed by this Company are hereby notified that they are not engaged for any particular length of time, and the Company reserves to itself the right to terminate the services of any employe at pleasure; and the party executing this Application does hereby acknowledge and agree to abide by such notice and conditions, and accepts employment subject to being discharged at any time by the Company or its Agents.

New York, Nov. 1892.

1. Name in full. William Berdett West. * * *

Bond required for \$1500 subject to and in accordance with the Rules and Regulations of the American Express Company. Dated at Parsons, State of Kansas, the 15th day of October, 1896.

(Signature of applicant.) William Berdett West.
Description of Person Employed.

Whereas, I, the undersigned, have entered, or am about to enter the employment of the American Express Company, and in the course of such employment may be required to render services in the care, carriage or handling of merchandise and property in course of transportation by cars, vessels and vehicles belonging to the different railroad, stage and steamboat lines upon which the Company relies for its means of forwarding property delivered to it to be forwarded;

And whereas, such Express Company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be obligated

to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employes;

Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employe of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation, or of any employe of any person or corporation, or otherwise.

And I hereby bind myself, my heirs, executors and administrators with the payment to such Express Company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

I do hereby ratify all agreements heretofore made by said Express Company with any corporation or persons operating any railroad, stage and steamboat line in which such Express Company has agreed in substance that its employes shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements insofar as the provisions thereof relative to injuries sustained by employes of the Company are concerned, as fully as if I were a party thereto.

And I do hereby authorize and empower said Express Company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporations or persons operating any railroad, stage or

steamboat line, for my transportation as a messenger or employe free of charge, upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employe of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and of all persons upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporation or persons.

I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said Company, or any of its members, officers, agents or employes, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said Company a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators with the payment to said Express Company, on demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

Witness my hand and seal this 15th day of October, One Thousand Eight Hundred and Ninety-six.

WILLIAM BERDETT WEST.

.....
Parent or Guardian.

In presence of

G C Gates.

Note: If applicant is under age, his guardian must also sign this release.

AGREEMENT

as to

Bonding, and Losses by Carelessness, Negligence or
Defalcation.

This agreement, made this 15th day of October, A. D. 1896, between William Berdett West, hereinafter called the "Subscriber," and the American Express Company, hereinafter called the "Company."

Witnesseth: 1. That the Subscriber to this agreement, an employe in the service of said Company, in consideration of the wages paid or to be paid to him by the said Company, hereby agrees with said Company that he will at all times hereafter keep just, true and correct accounts of all business of said Company, coming into his hands as such employe or otherwise; and will make and forward to the proper officers of said Company full, true and correct statements of the accounts of the business of said Company so coming to his hands, whenever the same shall be required by the rules and regulations of said Company, or by any officer of said Company; and will in like manner make true, full and correct statements showing the correct state of his accounts as such employe, at the end of each and every month, or as often as required; and will collect all dues and all sums of money due and payable, or which may become due and payable, to said Company, which he shall be required to collect as such employe by the rules and regulations of said Company; and will duly pay over to said Company, or authorized agent thereof, all sums of money that are now due from him to said Company, or that may hereafter become due, or that may in any manner come into his hands as such employe and belonging to said Company, whenever required by the rules and regulations of said Company, or any officer thereof; and will do and perform all and singular the duties of such employe that now are, or may hereafter be lawfully imposed upon such employe by said Company, and attend diligently and faithfully thereto.

II. And the Subscriber hereto expressly agrees that, if in any action at law or in equity brought upon this agreement, or if in any legal proceedings whatever, it should become necessary to show the amount of money or other property of said Company, or in which it should have any interest, at any time in his possession or control, or in any manner chargeable to him, the books, papers and records of said Company, including the printed or written instructions and circulars of any of the officers thereof, to its Agents, shall be admitted as competent

evidence of whatever may therein be contained, without any other evidence of their authenticity than proof by some officer or stockholder of the Company, that they are in fact the books, papers, records, instructions or circulars thereof, or of its officers; and the evidence of any officer or stockholder of the Company shall not be excluded because of any pecuniary interest he may have in such action or proceeding.

III. And the Subscriber hereto further agrees to pay to the said Company from year to year, when called upon, so long as he shall remain in its service, such sum as the said Company may consider necessary to protect it from loss on account of any act, negligence, or default of his, not exceeding, however, the rate per year fixed by the General Rules and Instructions of the Company relative to Bonding and Premium for employees of the same class performing the same duties. And the moneys so paid by the Subscriber hereto, together with similar amounts paid by other employees of the Company, shall constitute a fund to secure the Company against loss by negligence, carelessness, dishonesty or disregard of the Company's Rules and Instructions, on the part of any of its employees contributing to said fund, and may be applied by the said Company to make good any such loss.

The disposition of the said fund shall be governed by the provisions of the Company's Rules and Instructions, in force from time to time, relative to Bonding and Premiums.

No moneys so paid, or any part thereof, shall be returned in any case to said Subscriber or any other employe, except upon the terms and conditions provided for the return of premiums in and by said Rules and Instructions.

IV. And it is also agreed that in case the Subscriber hereto shall quit the service of the said Company, the Company shall have the right to withhold any moneys which may be due him until after a reasonable time for an examination of his accounts as such employe, has elapsed, and that the same may be retained by the Company, and applied in payment of any claims made against the Company, which, after due investigation are determined by the Company to be proper to be paid by the Subscriber hereto, on account of negligence or otherwise, and it is further agreed that salary due at any time may be applied in payment of errors in accounts rendered to the Company by the Subscriber hereto.

(Sign name in full)

WILLIAM BERDETT WEST. (Seal)

Witness: G. C. Gates.

Rules for bonding, with conditions, rates and regulations of the Company governing same—Subject to changes at any time, on notice to be given employes through the monthly circular issued from the President's office. * * *

Endorsed on back: 43 No. Southern Application for Situation of William B. West, Parsons, Kansas. Position, Messenger. Dated October 16th, 1896. This application must be sent to General Superintendent, attached to the notice of appointment of employe.

The General Superintendent must note on appointment blank (form 103) before forwarding same to Auditor, that the Application (form 203), duly executed, is on file at his office, otherwise, voucher for the first month's pay of a new employe will not be passed by General Accounting Office. Joint MK&T Bond (1500.00) Prm Paid On file Bond on file. OK FS.

(Title of Cause.)

REPLY TO SECOND AMENDED ANSWER.

The plaintiff for reply to the second amended answer of the defendant in the above entitled action, denies the said answer and each and every allegation therein contained, save as in her complaint hereinbefore stated, or as hereinafter admitted, stated or qualified.

Plaintiff denies any knowledge or information sufficient to form a belief as to the execution of Exhibits "A" and "B," attached to said answer, and made a part thereof.

Further answering defendant plaintiff alleges that the said pretended contract, evidenced by Exhibits "A" and "B," purports to be, and if any such instruments were ever signed by William B. West, mentioned in the pleadings, they were so signed and said contract if it was attempted to be made at all, was attempted to be made in the State of Kansas during the years 1893 and 1896;

That at that time by virtue of the laws and statutes duly existing in the said state of Kansas, all Railroad Companies operating within said State of Kansas were liable for all damages done to persons or property if done in consequence of any negligence upon the part of said Railroad Companies and by the laws and statutes of said state, all contracts by which it was attempted to release any Railroad Company from such damages, was void as being in violation of said laws and statutes and of the public policy of the State of Kansas, and that said laws and statutes ever since have and still do exist and are in force in said State of Kansas, and that said contract was wholly without consideration;

That by reason of the existence of said laws and statutes and the want of consideration, aforesaid, the said pretended con-

tract or the evidence thereof purporting to exist in Exhibits "A" and "B" attached to the answer of the defendant were and are wholly void and of no effect.

Wherefore plaintiff demands judgment as prayed in her complaint.

S. GRANT HARRIS and
BENJ. MARTIN, JR.,
Attorneys for Plaintiff.

(Title Omitted.)

THIRD AMENDED ANSWER.

(Omitting Exhibits "A," "B" and "C," Exhibits "A" and "C" being substantially the same as Exhibit "B," which exhibit is attached to the Second Amended Answer.)

Comes now the defendant and by leave of Court first had and obtained, for its third amended answer to the petition filed herein denies each and every material allegation thereof.

Further answering, defendant states that even if the said William B. West, deceased, was injured and killed at the time, place and in the manner as alleged in the plaintiff's petition, but no part of which is admitted, but all of which is denied, that his said injuries and death were not due to any negligence on the part of this defendant or any of its agents, servants, or employes, but were due solely to negligence on the part of the said William B. West.

Further answering, defendant states that it is now and was at all times mentioned in plaintiff's petition, a common carrier by railroad engaged in commerce between the several states, and that the passenger train described by plaintiff in said petition as the "Katy Flyer" was at all times mentioned therein, an interstate train, starting from St. Louis, in the State of Missouri, and passing into and through the States of Kansas, and Oklahoma, and thence into the State of Texas, and at all times therein mentioned was engaged in the movement of interstate commerce, and defendant further states that the said freight train described in plaintiff's said petition, was on the said 15th day of May, 1908, a train starting from Muskogee, in the State of Oklahoma, and proceeding on its way over the defendant's line of railway to Parsons, in the State of Kansas, and was on said date, and at all times mentioned in plaintiff's petition, engaged in moving interstate commerce.

Further answering defendant states that prior to the time of the alleged injury in question, the said William B. West had made application to the American Express Company in writ-

ing for employment by it as driver of one of its wagons at Parsons, Kansas, and was so engaged pursuant to the terms of a written contract, said contract being dated January 9, 1893, a copy of which contract is hereto attached marked Exhibit "A," and made a part of this answer.

Further answering, defendant states that prior to the time of the alleged injury in question the deceased, William B. West, had made application to the said American Express Company in writing for employment by it as an express messenger, and that in pursuance of said application he was prior to and at the time of the alleged injury in question employed by the said American Express Company, under a contract in writing between him and said Company, which contract was dated October 15, 1896, a copy of which is hereto attached, marked Exhibit "B," and made a part hereof, and which said contract includes as part of its provisions the contract hereinabove referred to and marked Exhibit "A."

Further answering, defendant states that by the terms of said contract hereinabove identified as Exhibit "B," it was provided that in the consideration of the premises and of the employment of deceased, he did assume all risk of accident and injury which he should meet with or sustain in the course of his employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employe of any such corporation or person, or otherwise, and whether resulting in his death or otherwise.

Further answering, defendant states that by the terms of said contract it was provided that in case of any injury suffered by deceased, he would at once, without demand, and at his own expense execute and deliver to the corporation or person owning or operating the railroad, state or steam-boat line upon which he should be so injured, a good and sufficient release under his hand and seal of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom.

Further answering, defendant states that by the terms of said contract it was provided that the deceased ratified all agreements theretofore made by said Express Company with any corporation or person operating a railroad, stage and steamboat line in which such express company had agreed in substance, that its employes should have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and deceased further agreed to be bound by each and every of such agreement insofar as to provisions thereof relative to injury sustained by employes of the company were concerned as fully as if he were a party thereto.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did thereby authorize and empower said express company at any time while he should remain in its service to contract for him and in his behalf in its own name or in his name, with any corporations or persons operating a railroad, stage or steamboat line, for his transportation as a messenger or employe, free of charge, upon the condition and consideration that neither he nor his personal representatives, nor any person claiming under him would make any claim for compensation because of any injury sustained by him, whether resulting on the gross negligence of such corporations or persons, or of any employes of such corporations or persons or otherwise, and the contract so made should be as binding and obligatory upon him as if signed and delivered by him. Further answering, defendant states that by the terms of said contract it was provided that the deceased did agree that the provisions of said contract should be held to inure to the benefit of any and every corporation and to all persons upon whose railroad, state or steam-boat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

Further answering, defendant states that by the terms of said contract it was provided that the deceased did agree that in consideration of his employment by said Express Company that he would assume all risks of accident or injury which he would meet with or sustain in the course of such employment, whether occasioned by negligence of said company or any of its members, officers, agents or employes, or otherwise.

Further answering, defendant states that at the time of the alleged injury in question the deceased was in the express car referred to in plaintiff's petition, being transported by this defendant over its said line of railway from points in the State of Kansas through the State of Oklahoma and into the State of Texas, and was in said car in pursuance of said contract hereinabove referred to as Exhibit "B," and states that plaintiff is, therefore, now barred from maintaining this action.

Further answering, defendant admits that at and prior to the death of the said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of railroad between the City of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas, and admits that the deceased, William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express car of the said defendant railway company, and defendant railway company

states that said William B. West, deceased, in performing said duties in handling said baggage was doing so under and by virtue of his said employment by the said American Express Company, and that such handling of such baggage by said West was for and in behalf of and under the direction of said Railway Company.

Wherefore, having fully answered, defendant prays that it be adjudged to go hence without day, with its costs in this behalf laid out and expended.

CLIFFORD L. JACKSON,
Attorney for Defendant.

* * * * *

[Note: Exhibits "A" and "B" are omitted, Exhibit "A" being substantially the same as Exhibit "B," which is attached to the second amended answer. Both are omitted here to avoid duplication.]

[Note: Defendant's Exhibit "C", by leave of the trial court, was also attached to the Third Amended Answer as an amendment. It is an application for a situation as a driver of an express wagon, made by William B. West to the American Express Company, and is dated at Parsons, State of Kansas, the 18th day of October, 1893, and is in form like Exhibit "A," and hence is omitted to avoid unnecessary duplication in the printed record.]

(Title of Cause.)

REPLY TO THIRD AMENDED ANSWER.

I.

Plaintiff for her reply to the third amended answer of defendant, save as in her complaint alleged and as hereinafter alleged, incorporated, admitted or qualified, denies each and every allegation, averment, matter and thing in said third amended answer contained.

II.

Further replying plaintiff hereby refers to and adopts, repeats and reaffirms each and all of the allegations as set out and alleged in her reply to the second amended answer of said defendant and incorporates the same herein and makes them a part of this reply, in like manner as though they were specifically set out and realleged herein; and plaintiff further specifically denies that the pretended contracts and each of

them set out and referred to in defendant's second and third amended answers were valid or in force at the time of the collision set out in plaintiff's complaint or at any time, and specifically denies that said decedent, William B. West, was at the time of his death or at any other time, working under said pretended contracts, or either of them; and specifically denies that on the day of his death or at any other time he was riding in said car of defendant in pursuance of said pretended contracts or either of them or of any written contract as alleged in defendant's second and third amended answers.

III.

Further replying plaintiff alleges that at the time said contracts and each and both of them were made and ever since the making thereof the statutes of the State of Kansas have provided as follows, to-wit:

"That railroads in this state shall be liable for all damages done to person or property when done in consequence of any neglect on the part of the railroad company."

Wherefore plaintiff demands judgment against said defendant as prayed for in her complaint herein.

IVOLUE B. WEST.
By S. GRANT HARRIS,
and BENJ. MARTIN,

Attorneys for Plaintiff.

Also as follows, to-wit: "Every railroad company organized and doing business in the State of Kansas shall be liable for all damages done to any employe of said company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employes, to any person sustaining such damage." "Provided that notice in writing that an injury has been sustained stating the time and place thereof shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury."

(Title of Cause.)

DEMURRER TO PLAINTIFF'S REPLY TO DEFENDANT'S THIRD AMENDED ANSWER.

Comes now the defendant and demurs to the second paragraph of plaintiff's reply to the defendant's third amended answer for the following reasons, to-wit:

Said paragraph does not state facts sufficient to avoid the

allegations of the defendant set up in its third amended answer and relied upon as a defense in this action.

Defendant further demurs to the third paragraph of the plaintiff's reply to the defendant's third amended answer, for the reason that said paragraph does not state facts sufficient to avoid the allegations set up as a defense by the defendant in its third amended answer.

Wherefore, the defendant prays judgment of the court upon its demurrer.

CLIFFORD L. JACKSON,
J. G. RALLS,
Attorneys for Defendant.

ORDER OVERRULING DEMURRER.

Thereafter and on the 29th day of March, 1910, and during the February, 1910, term of the said court, the demurrer of the defendant to the plaintiff's reply to the defendant's third amended answer came on for hearing before the court, and after argument of counsel, the court being fully advised in the premises, overruled said demurrer, to which action of the court in overruling said demurrer, the defendant then and there excepts.

(Title of Cause.)

REJOINDER TO REPLY TO DEFENDANT'S THIRD AMENDED ANSWER.

Comes now the defendant and for its rejoinder to the reply of the plaintiff to the third amended answer of the defendant, denies each and every material allegation therein contained.

CLIFFORD L. JACKSON,
J. G. RALLS,
Attorneys for Defendant.

ALL TESTIMONY AND PROCEEDINGS IN THE CASE
BEARING UPON THE MOTIONS AND RELATIVE TO
THE EMPLOYMENT OF WILLIAM B. WEST, DECEASED.

TESTIMONY OF IVOLEUE B. WEST.

(Omitting cross-examination and re-direct examination which
have no relation to the motions.)

Ivolute B. West, the plaintiff, (now defendant in error), being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Taylor:

Q. State your name?

A. Ivolute B. West.

Q. Where do you live, Mrs. West?

A. Parsons, Kansas.

Q. How long have you lived there?

A. About 21 or 22 years.

Q. Are you the wife of William B. West referred to in the complaint?

A. Yes, sir.

Mr. Allen: Defendant objects to the question and answer, and asks that the answer be stricken.

Mr. Taylor: I consent to that.

Q. You are the plaintiff in this suit?

A. Yes, sir, me and my children.

Q. Did you know William B. West, the deceased, who is referred to in the complaint in this action?

A. Yes, sir.

Q. How long have you known him?

A. About 23 years.

Q. What relation were you to William B. West?

A. His wife.

Mr. Allen: Defendant objects to the question and asks that the answer be stricken for the reason that it is incompetent, irrelevant and immaterial, and not the best evidence.

By the Court: Objection overruled.

Mr. Allen: The defendant excepts.

Q. (Question read by stenographer)?

A. His wife.

Q. When and where were you married?

A. Parsons, Kansas.

Mr. Allen: Defendant objects to any testimony showing the marriage relation in this case for the reason that oral testimony from the witness is not the best evidence, and for the reason it is incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

Mr. Allen: The defendant excepts.

Q. When?

A. 18—

Q. How many years ago?

A. 19 years ago.

Q. Have you lived together ever since as husband and wife?

A. Yes, sir.

Mr. Allen: Defendant objects as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

Mr. Allen: The defendant excepts.

Q. How many children, if any, have you and William B. West had?

A. I have four.

Q. What are their names, sex and ages?

A. Three girls and a boy.

Q. Which is the oldest?

A. The oldest girl is 17, Norma Parris West.

Q. And the second one?

A. The second one is a boy, S. Glenford P. West.

Q. And the third one?

A. Wilmeta, and the baby is Ida Elizabeth.

Q. How old is Wilmeta?

A. Three.

Q. A girl?

A. Yes, sir, and the baby is a year and a half old.

Q. When was the baby born?

A. Six weeks after the accident.

Q. That is six weeks after the death of the father?

A. Mr. West, yes, sir.

Q. And these children are all alive at the present time?

A. Yes, sir.

Q. And they are all the children of William B. West?

A. Yes, sir.

Q. How old are you, Mrs. West?

A. I am 38.

Q. How old was your husband at the time of his death?

A. 38 years, 5 months and 14 days.

Q. And what day did he die?

A. He died May 15, 1908.

Q. At the time of his death what was his occupation?

A. He was an American Express Messenger.

Q. Was he working for the American Express Company at that time?

A. Yes, sir.

Q. In what capacity?

A. Messenger.

Q. Where?

A. In the express car.

Q. On what road?

A. Main line between Parsons and Dallas, Texas.

Q. On what road?

A. Missouri, Kansas & Texas.

Q. On the road of the defendant in this suit?

A. Yes, sir.

Q. And on that day, the date of his death, May 15, 1908, where was he?

A. He was on his run between Parsons, Kansas, and Muskogee.

Mr. Allen: We object as incompetent, irrelevant and immaterial.

By the Court: She perhaps doesn't know where he was at that time.

Q. At that time was he on his run?

A. Yes, sir.

Q. Of course you don't know just where he was?

A. No, sir, I don't know just exactly.

Q. When did you first hear of his death?

A. About one o'clock Friday, after dinner.

Q. What day was that?

A. May 15, 1908.

Q. And when did you first see his body?

A. The following Saturday about one o'clock; 1:30 to 2 o'clock.

Q. That is the next day?

A. Yes, sir.

Q. Where did you first see it?

A. At home; the undertaker brought him out.

Q. How long had he been working for the American Express Company in this capacity?

A. Five years.

Q. And during all of that period had he been working on this same run?

A. Yes, sir.

Q. What amount of wages, if you know, was he receiving during this period of five years?

A. He drew \$83.33 1/3.

Q. During the whole of that period?

A. No, sir, the first part was \$80.00, then he got a three per cent raise.

Q. You mean \$80.00 per month?

A. Yes, sir, and then a \$3.33 1/3 raise.

Q. Was that during the period of five years he was engaged in this employment, how much of the time was he receiving \$80.00 per month, approximately?

A. Well, close on to two and a half or three years, as near as I can remember.

Q. And he was receiving \$83.33 $\frac{1}{3}$ per month from that time until the time of his death?

A. Yes, sir.

Q. Was he employed by this same company prior to that time?

A. Yes, sir.

Q. Whereabouts?

A. On the local trains.

Q. In what state?

A. The same state, on the Missouri, Kansas & Texas.

Q. On what line?

A. 1, 2, 3 and 4; on the same line, but on 1, 2, 3 and 4 trains.

Q. What was the terminal points of that run?

A. Denison, Texas.

Q. From what point?

A. Parsons, Kansas.

Q. And during that employment, how much did he receive?

A. \$80.00.

Q. During all of that time?

A. \$75.00 and \$80.00.

Q. And how much of the time was he receiving \$75.00 and how much \$80.00; about how much?

A. Just about the same as the other; from two and a half—just about half of the time he run.

Q. How long was he on that line?

A. About four years I guess.

Q. And did he ever have any other employment with this company, the American Express Company?

A. Yes, sir, he was transfer clerk in the office.

Q. For how long?

A. About three or four years.

Q. At what point?

A. Parsons, Kansas.

Q. And during what period did he work in the office; well, with respect to the time he began working on the main line, on the Katy Flyer?

A. He left the office and went on 1, 2, 3, and 4 and they moved us up to Sedalia, Missouri; then they cut the run in two and made the division at Parsons, Kansas, and Denison, Texas, and they brought him back and he run about two years on those trains, and then on the Flyer.

Q. Was he in the office between the time he went on to the Flyer and the time he had employment on the other division?

A. No, sir.

Q. Prior to that time he was in the office four years?

A. Yes, sir, and prior to the time he was in the office he run between Parsons and Coffeyville, made two round-trips a day.

Q. Was that in the State of Kansas?

A. Yes, sir.

Q. What was the terminal points?

A. Parsons and Coffeyville, Kansas.

Q. What wages did he get during that time?

A. \$50.00.

Q. Do you know about what time he left that employment and went to working in the office?

A. About 16 years ago.

Q. Well, what was his employment before he was on the Coffeyville branch?

A. He drove a wagon.

Q. Express wagon?

A. Yes, sir, but that was for the Pacific.

Q. Another express company?

A. Yes, sir, and the American bought them.

Q. Now, at the time of his death what was the general condition of your husband's health?

A. Excellent.

Q. How large a man was he?

A. He was about five feet, six inches, and would weigh 168 to 170 pounds.

Q. And had he ever been sick?

A. No, sir, only from an injury caused from the fall of a sample trunk in the express car that laid him off of duty.

Q. For how long?

A. About three weeks.

Q. So he never was sick of any disease?

A. No, sir, he was not sick.

Q. Was he a strong man?

A. Yes, sir.

Q. In good health at the time of his death?

A. Yes, sir.

Q. Between what points, what were the terminal of his runs during his last five years?

A. Between Parsons, Kansas, and Dallas, Texas.

Q. Now, Mrs. West, how much of the earnings of your husband was turned over to his family, to you and his children?

A. All of them.

Mr. Allen: The defendant objects as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

Mr. Taylor: The plaintiff excepts.

Mr. Allen: I would like to have the answer stricken out.

Mr. Taylor: The plaintiff offers to show by this witness

that the earnings of the husband with the exception of a certain amount, were turned over for the support of his wife and children regularly for the purpose of showing the financial loss to the family from this source.

Mr. Allen: If the Court please, we would like to have the answer of the witness stricken.

By the Court: The answer will be stricken.

Q. Mrs. West, outside of the earnings of your husband for the support of yourself and children, did you have any other source of income?

A. No, sir.

Mr. Allen: We object on the grounds it is incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

Q. What means of support had you for yourself and your children?

Mr. Allen: We object as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

Mr. Allen: The defendant excepts.

Q. (Question read by stenographer)?

A. Outside, or while he was living?

Q. Yes.

A. Not any.

Q. You mean not any outside of his earnings?

A. No, sir.

Q. You have any other income from any source?

A. No, sir.

Q. How much of this income derived from the earnings of your husband was necessary for the support of yourself and children?

A. All of it.

Mr. Allen: We object as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

Mr. Allen: The defendant excepts.

Q. And what portion of the earnings did he retain for his personal expenses?

A. Just about—

Mr. Allen: We object as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

Mr. Allen: The defendant excepts.

A. He held out from \$3.00 to \$5.00 for his expenses on the road during the month.

Q. Was any administrator ever appointed for his estate?

A. No, sir.

Q. And for whose benefit was this action brought?

Mr. Allen: We object as a conclusion of law, and as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

Mr. Allen: The defendant excepts.

Q. (Question read by stenographer).

A. For myself and four children.

Q. How many times had the wages of your husband been increased during your married life in his different employments?

A. About five.

Q. You never had any children other than these children by William B. West?

A. No, sir.

Q. Now, Mrs. West, please state what the relations of your husband, with respect to his children, were, with respect to whether he gave them fatherly care and attention, or otherwise?

Mr. Allen: Defendant objects as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

Mr. Taylor: The plaintiff excepts.

Q. I don't know but that you stated where was the place of your residence at the time of your husband's death?

A. Parsons, Kansas.

Q. And that was the place of residence of your husband?

A. Yes, sir.

Q. And how long had you and your husband resided there?

A. About five years.

Q. And how long did you state that you resided in the State of Kansas all together?

A. 22 years; you mean he and myself?

Q. Yes.

A. 19 years.

Q. Then you resided in Kansas all of the time excepting the short time you were in Missouri?

A. Yes, sir.

Q. How long were you in Missouri?

A. Eight months.

Q. How long ago was that, about?

A. Well, at the time of the accident about six years.

Q. You have never removed since your husband's death?

A. No, sir.

Q. And are the children still living with you?

A. Yes, sir.

Q. And being supported by you?

A. Yes, sir, they are all minor children.

Q. Has there ever been any personal representative or administrator appointed for your husband's estate?

A. No, sir.

Q. Take the witness.

* * * * *

Cross-examination by Mr. Allen and re-direct examination by Mr. Taylor of Mrs. West relate only to the earning capacity of Mr. West, and are omitted as immaterial on the motions.

TESTIMONY OF G. C. GATES AND ALL PROCEEDINGS IN CONNECTION WITH IT.

G. C. Gates, being first duly sworn, testified as follows on behalf of the defendant:

DIRECT EXAMINATION.

By Mr. Allen:

Q. State your name?

A. G. C. Gates.

Q. Have you been sworn, Mr. Gates?

A. Yes, sir.

Q. Where do you live at this time?

A. Dallas, Texas.

Q. What was your employment, Mr. Gates, during the month of October, 1906; I don't mean 1906, I mean 1896?

A. I was road agent American Express Company at that time.

Q. Were you acquainted with the person who was an express messenger on the train known as William B. West, in his life time?

A. Yes, sir.

Q. I show you an American Express Company's application for situation of William Burdett West, and ask you if you are acquainted with that paper?

A. Yes, sir.

Q. Does that paper bear your signature, Mr. Gates?

A. Yes, sir.

Q. Does it bear the signature of Mr. West?

Mr. Taylor: That is objected to as incompetent, irrelevant and immaterial, and if it is what I assume it is, it seems to me it might be well to excuse the jury on this argument because I propose to keep these papers out of the record, if possible, and I don't think they are admissible and before we get them in the record I want to dispose of that question.

By the Court: Well, it is now near 12 o'clock so we will dispose of that question before noon.

Thereupon the Court admonished the jury, permitted them to separate and ordered them to return into Court at 1:30 P. M.

Mr. Taylor: As far as the signature is concerned, at the proper time we are willing to admit that it is his signature, if the papers have any bearing in the case at all. The paper which is shown the witness and which counsel I understand propose to make an exhibit in the case is objected to on the ground that it is not pleaded, and on the further ground that it is incompetent, irrelevant and immaterial, and shows on its face that it is void under the laws of the State of Kansas where it was made as also appears upon the face of the paper, and on the further ground that it is a paper purporting to be an application, an agreement made between the plaintiff in this action and a person not a party to this action and having no connection with it, and a paper which the defendant in this action has not signed, and upon which the defendant is in no way bound. The grounds with respect to its being void under the Statute of the State of Kansas where it was made, of course, is purely a matter of law, and it may be we had better argue that at this time, but I think the other objections are perfectly good to it, so I suppose we might as well take that up first.

By the Court: Is not that one of the contracts pleaded?

Mr. Taylor: I think not, but they have two others here. We make the same objection to the three papers presented.

Mr. Ralls: We expect to show in this connection that the deceased made these applications for employment upon the terms expressed in the applications, and that he was employed according to those terms and was acting as such employee under the terms of these applications at the time he received the injury, and that in this application he had stipulated and agreed that the American Express Company might, for him, go into a contract releasing any railroad company from liability on account of injuries in the words as set out in the accident release clause contained in the application. And we expect to follow that up by showing that the American Express Company did enter into a contract releasing the M. K. & T. Railroad Company from liability for any of the accidents provided for in this application; and that the accident which caused his death was one that was covered by the provisions of this application, and that it released the M. K. & T. Railroad Company from any liability on account of the death of West, and the witness we had on the witness stand was to show the signature of West, and to show further that he was employed and worked under the terms of these contracts.

Mr. Taylor: Of course it is denied he was working under these contracts. I will ask the reporter to enter right here the further objection that the contracts and matters which counsel has referred to as being made between the defendant railroad company and the American Express Company are not pleaded

or set out and could not possibly bind the plaintiff in this action; they are immaterial.

Whereupon the hour of noon having arrived Court took a recess until 1:30 P. M.

AFTERNOON SESSION.

Thereupon the following proceedings were had in the presence of the jury:

Mr. Allen: We now offer in evidence the application for situation of William B. West, Parsons, Kansas, for the position of messenger, dated October 16, 1896, the signature of Mr. West having been admitted by counsel for the plaintiff, which document includes the accident release over the signature of Mr. West, as Defendant's Ex. "A."

Mr. Allen: The defendant now offers in evidence the application for a situation of W. B. West, the deceased, for the position of driver, bearing date of January 9, 1893, and the line being erased there with February 1st inserted above, it being admitted by the plaintiff that the signature of W. B. West appended to the application is the signature of the deceased, W. B. West, which application also includes a release accident clause over said signature, as Defendant's Ex. "B."

Mr. Allen: Defendant now offers in evidence the application for situation of William B. West of Parsons, Kansas, as driver, dated October 18, 1893, the signature of said William B. West or W. B. West being admitted by the plaintiff, which document also includes accident release. In connection with this application I will say it has not been pleaded in our answers in this case for the reason that at the time of the preparation of the answer counsel for defendant had not been supplied with the release and we now ask leave to amend our third amended answer to show the execution of this release and our reliance upon this defense in the same manner as the other releases have been pleaded. We ask the exhibit be marked Defendant's Ex. "C."

Mr. Taylor: Plaintiff objects to the offer of Exhibits "A," "B," and "C" on the ground that they, and the papers and contracts referred to in them have not been pleaded, and that hence they are incomplete, and on the further ground that they are incompetent, irrelevant and immaterial, and show on their face that they refer to other employment than that in which plaintiff was engaged at the time of this accident, and on the ground that upon their face they are outlawed and barred by the Statute, and on the further ground that the plaintiff at the time of this accident was not engaged in any employment referred to or contemplated in the instrument, and on the further ground that the instruments and all three of them are shown

on their face to be contracts of the State of Kansas and made therein, and that they are void absolutely under the laws of the State of Kansas wherein they were made, and under the decisions of that State, and in connection with the last of these objections plaintiff offers the Statutes in evidence of the State of Kansas, which were pleaded in the reply to defendant's second and third amended answers.

Mr. Ralls: The defendant objects to the introduction of the Kansas Statute referred to on the ground it is incompetent, irrelevant and immaterial, and inadmissible. I am not objecting to the form he is offering it, but to the Statute itself.

By the Court: Objection overruled.

Mr. Ralls: The defendant excepts.

Mr. Taylor: The section referred to which the plaintiff introduces in evidence are those contained in the General Statutes of Kansas of 1905 on page 1257, being Sections No. 6311 and 6312.

Section 6311 reading: "Liable for damages. That railroads in this state shall be liable for all damages done to person or property, when done in consequence of any neglect on the part of the railroad companies." (L. 1870, ch. 93.)

Section 6312 reading: "To employe. 22. Every railroad company organized or doing business in the State of Kansas shall be liable for all damages done to any employe of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes, to any person sustaining such damage: Provided, That notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury."

There is something further in that section but nothing that relates to this case, so I will merely introduce that portion of that section unless counsel wants me to read it all.

Mr. Ralls: We will offer evidence to show that the deceased was working under this particular contract at the time he was injured; that this contract was broad enough and did cover the employment while he was in the employ of the American Express Company.

By the Court: It has always been a question with this Court as to how far things ought to go with reference to public policy; it is a pretty broad question. This Kansas Statute is plain concerning the action of railroads in paying damages, etc. I am of the opinion, gentlemen, from what I have read and the argument here that these contracts are void. You can make your offer to prove them and get them in the record and we will go on. I will so hold that the contracts are invalid;

my reason for sustaining the objection is under the Kansas Statute.

Mr. Ralls: The defendant excepts to the ruling of the Court.

Mr. Ralls: We now offer to prove by this witness that the deceased, Mr. West, was at the time of the accident which resulted in his death working for the American Express Company under the contract of employment that have been offered in evidence heretofore.

Mr. Taylor: We desire to make the same objection to this offer of counsel as those made to the offer to introduce the exhibits.

By the Court: Objection sustained.

Mr. Ralls: The defendant excepts.

Mr. Ralls: I presume the objection is sustained on the theory that the contracts are void?

By the Court: Yes.

Mr. Ralls: The defendant excepts.

Q. That is all with this witness.

(Witness excused.)

TESTIMONY OF F. D. ADAMS.

F. D. Adams, being first duly sworn, testified as follows on behalf of the defendant:

DIRECT EXAMINATION.

By Mr. Allen:

Q. State your name?

A. F. D. Adams.

Q. Have you been sworn as a witness, Mr. Adams?

A. Well, I was sworn yesterday, yes, sir.

Q. What is your business, Mr. Adams?

A. At present time, General Superintendent of the Southern Division of the American Express Company.

Q. Did you know Mr. West in his lifetime?

A. Yes, sir.

Q. Do you know of the,—at the time of his death, or do you know the time of his death?

A. I didn't understand your question.

Q. Do you know at what time he met his death?

A. Yes, sir, May 15, 1908.

Q. At that time do you know what relation existed between Mr. West and the M. K. & T. Railroad Company with reference to handling baggage of that company?

A. Yes, sir.

Q. What was that relation, Mr. Adams?

Mr. Taylor: I would like to ask first if there was anything in writing, any written agreement.

By the Court: Don't you plead, Mr. Taylor, he also handled passenger baggage?

Mr. Taylor: Yes, sir, we plead it.

Mr. Allen: We expect to go further by this witness.

By the Court: All right, go ahead and ask the question.

Mr. Taylor: Is there a written contract regarding it?

Witness: I don't exactly understand what you refer to as a written contract.

Mr. Taylor: He asked you what the relation was between the two and I want to know if it was expressed by any written agreement?

Witness: I couldn't say that there was.

Q. Now, what was that relation, Mr. Adams?

Mr. Taylor: That is objected to as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

Mr. Taylor: The plaintiff excepts.

A. Well, he was a joint messenger and baggage man.

Q. By joint you mean with the M. K. & T. and the express company?

A. Worked for both companies, yes, sir.

Q. Do you know what proportion of his salary was paid by those companies, or whether it was paid in any proportion?

A. Equal division.

By Mr. Taylor:

Q. Was this in writing, any of it, relating to the salary as between the railroad company and the express company; if it is in writing this is not the best evidence?

Mr. Ralls: We offer this for the purpose of showing that the deceased was a joint employe of the American Express Company and the M. K. & T. Railroad Company, while he was running as messenger on the line.

Mr. Taylor: If this agreement was in writing it is the best evidence; I don't see why we are bound by any agreement between these two companies.

By the Court: If the agreement was not in writing he can answer the question.

Mr. Taylor: The plaintiff excepts.

By Mr. Allen:

Q. Have you got a copy of a notice among your files or in your possession directed to the various messengers of the American Express Company as to their duties with reference to the baggage of the Missouri, Kansas & Texas Railroad Company?

A. I have a copy of a general circular issued to them.

Q. Have you it with you?

A. Yes, sir.

Q. Produce it, please, sir?

A. Here is a copy.

Q. By whom was this circular issued, Mr. Adams?

A. It was issued by myself.

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Q. In what capacity?

A. As Superintendent.

Q. It is directed to joint messengers and baggage men; it appears to be on the M. K. & T. line; that means joint messenger of what?

A. Joint messengers; we call or term these men messengers, and the railroad baggage men, and the word joint signifies they worked for both companies.

Q. Does that include the position which Mr. West occupied?

A. Yes, sir.

Mr. Taylor: That is objected to as calling for a conclusion and incompetent, irrelevant and immaterial, and we ask that it be stricken.

By the Court: Objection sustained; the answer will be stricken.

Mr. Allen: We offer in evidence the paper identified by the witness, being a copy of instructions to joint messengers and baggage men on the M. K. & T. lines as Defendant's Ex. "D."

Mr. Taylor: It is objected to on the ground that it is incompetent, irrelevant and immaterial, and not the best evidence, and that the recitals therein contained are not shown to have ever been brought to the attention of the plaintiff in this action, and that the recitals themselves have no support in the evidence to sustain them.

Mr. Allen: I expect to show further how it was transmitted and delivered, and how it reached these messengers, and how their attention was called to it.

By the Court: If there is something in writing about the joint payment, I think it would be better than what you are offering there. Objection sustained.

Mr. Allen: The defendant excepts.

Mr. Allen: Now, I take it that the Court has sustained this objection because it has not been sufficiently identified.

By the Court: Well, it is simply just what he might have told this deceased, William B. West.

Mr. Allen: We offer to show by Mr. Adams that at the time Mr. West went into the service as messenger he understood that it was his, West's, duties to perform joint services for the railway company and the Express Company.

Mr. Taylor: Further than the matters offered to be shown are admitted by the pleadings, we object to the offer as incompetent, irrelevant and immaterial.

By the Court: I think I will let him answer the question; objection overruled.

Mr. Taylor: The plaintiff excepts.

Q. What were Mr. West's duties with respect to the railway company as to handling the baggage, Mr. Adams?

A. Received the baggage at the stations, made a record of it, and put it off at its destination in the same manner any baggage man did.

Q. Do you know what runs he had at the time of his death?

A. He was running between Parsons, Kansas, and Dallas, Texas.

Q. Do you know whether, under such a run as that, he handled shipments of express from points in the State of Kansas to points in other states, for instance Oklahoma or Texas?

Mr. Taylor: That is objected to as incompetent, irrelevant and immaterial, but we will admit that he handled express and baggage matter between local points in each state and also between points in one state and points in another state.

By the Court: Answer the question then.

Mr. Allen: That is all I wanted to prove by him.

Q. Do you know whether Mr. West, at the time he was employed as messenger knew that he was to handle the baggage of the railroad company and act as joint employe of the railroad company and the express company?

Mr. Taylor: As to his opinion as to what Mr. West knew at that time we object to as incompetent, irrelevant and immaterial.

By the Court: Objection overruled.

Mr. Taylor: The plaintiff excepts.

Q. (Question read by stenographer)?

A. He did and was told to post himself in the work of both companies.

Q. Do you know, Mr. Adams, whether or not that train upon which Mr. West was messenger carried Interstate baggage, or baggage from points in one state to points in another state?

A. I would not be able to say upon that particular occasion, I could state as to express.

Q. That is all.

CROSS-EXAMINATION.

By Mr. Taylor:

Q. Who paid Mr. West?

A. He drew his money from the express company.

Q. All of his salary came from the express company?

A. Yes, sir.

Q. And for any work he done for them in handling baggage the railroad company would pay over to the express company?

A. They paid us one-half of his salary; we drew a bill against them in his name and the other baggage men.

Q. That is all.

(Witness excused)

TESTIMONY OF A. L. BIRD.

A. L. Bird, being first duly sworn, testified as follows on behalf of the defendant:

DIRECT EXAMINATION.

By Mr. Allen:

Q. State your name?

A. A. L. Bird.

Q. Where do you live, Mr. Bird?

A. Dallas, Texas.

Q. What is your position, did you say?

A. Superintendent American Express Company.

Q. Did you know Mr. W. B. West in his lifetime?

A. I did.

Q. Do you recollect the occasion of his death?

A. Yes, sir.

Q. Who was he working under, Mr. Bird?

A. Under my direct supervision.

(The balance of the testimony of Mr. Bird is omitted as it has no relation to the motions.)

 DEFENDANT'S EXHIBIT "D."

St. Louis, Mo., July 21st, 1897.

To Joint Messengers & Baggage-men,

On M. K. & T. Lines.

Gentlemen:—

In some instances I find there has been considerable controversy between messengers and train crews on joint runs in regard to your duties to the railroad company. Inasmuch as the railroad company pay a portion of your salary you are just as much an employe of the railroad on which you run as you are of the express company, and you must be just as careful of their interests as you are of this company and perform your duties to that company, as near as possible, in the same manner that they would be performed by exclusive baggage-men. In the event of any controversy between yourself and flagmen, or porters, you should refer the matter to the conductor and carry out his instructions.

There has been some difficulty in regard to the handling of train boxed in baggage cars, some messengers insisting that there was not room in the baggage end of the car and they should be carried on the platform. It does not matter where

the space in your car is, in the express or baggage end, if there is room in the car anywhere the box should be carried there, if requested to do so by the train men.

There is no reason why the joint business cannot be handled successfully and in harmony with the train crews and I want you to take up with the Train Master of your Division, or the General Baggage Agent, any matter of interest of the railroad company. Any difficulties between yourself and train men can, and unquestionably will, be settled by the conductor in charge of the train, if appealed to. There is no disposition on the part of either company, in whose service you are, to impose upon you duties that you cannot perform, and I know very well that the Superintendents and Train Masters of the railroad company will sustain you where it is shown that you are endeavoring to perform your duties satisfactorily.

There has been no serious complaint, but it must be understood that the instructions of the railroad company are to be complied with, where the same do not conflict with the standing rules of this company in regard to the care of money and valuables.

Yours truly,

Signed F. D. ADAMS,
Superintendent.

INSTRUCTIONS REQUESTED BY DEFENDANT, NOW PLAINTIFF IN ERROR.

No. 1.

The Court instructs the jury to find the issues in favor of the defendant.

Refused and defendant excepts.

John H. King, Judge.

No. 2.

If you find from the evidence in this case that the deceased W. B. West was not an employe of the defendant then the defendant would not be liable unless you should further find that the defendant was guilty of gross negligence and that as a result of such negligence the deceased was killed.

Refused and defendant excepts.

John H. King, Judge.

No. 3.

If you find from the evidence in this cause that the said W. B. West was employed by the defendant as baggage master and

was acting as such at the time of his death you will find the issues in favor of the defendant.

Refused and defendant excepts.

John H. King, Judge.

No. 4.

If you find from the evidence in this cause that the deceased W. B. West was an employe of the defendant, at the time he recived the injuries which caused his death, and that as such employee he was engaged in interstate commerce, as hereafter explained, then the laws of the United States would govern the liability of the defendant herein.

Refused and defendant excepts.

John H. King, Judge.

No. 5.

If you find from the evidence in this action that the deceased W. B. West at the time he received the injuries which caused his death was not an employee of the defendant, and if you further find that the deceased W. B. West entered into the contract introduced in evidence stipulating for a release of the defendant then your verdict should be for the defendant.

Refused and defendant excepts.

John H. King, Judge.

No. 6.

If you find from the evidence that the train upon which West was working was at the time of his death engaged in commerce between the states and that he was an employee of the defendant the plaintiff is not entitled to recover.

Refused and defendant excepts.

John H. King, Judge.

No. 7.

If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained and you are not to permit your sympathy to influence your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish—Your verdict must be based upon the financial loss in dollars and cents.

Modified and given, defendant excepts.

John H. King, Judge.

No. 8.

If you find for the plaintiff your verdict must not exceed ten thousand dollars.

Refused and defendant excepts.

John H. King, Judge.

(Title of Cause.)

CHARGE OF THE COURT.

I.

Gentlemen of the Jury:

You are instructed that this action is brought by the plaintiff as the widow of William B. West for the benefit of herself as such widow and of the minor children of herself and of said William B. West, deceased, for the alleged negligent killing of her husband while he was running upon one of the defendant's trains as an express messenger in the employ of the American Express Company.

Plaintiff alleges that at and prior to the time of the death of said William B. West he was employed by the American Express Company as a messenger, upon the express cars operated by the defendant company over its line of railroad between Parsons, Kansas, through the State of Oklahoma to points beyond in the State of Texas. That in addition to his duties as express messenger said West was also engaged in handling passenger baggage upon the express cars of the defendant company. That on May 15, 1908, at about 12 o'clock, noon, of said day, said William B. West in the course of his employment, was riding in one of the express cars of the defendant company, then being operated by defendant over its railroad in a southerly direction through the State of Oklahoma upon its train known as the "Katy Flyer." That when said train reached a short distance south of the Arkansas River between the stations of Verdard and Muskogee, said train through gross carelessness and negligence upon the part of the railroad company and while said train was running at a high and dangerous rate of speed, caused and allowed to collide in a head-end collision with a locomotive and freight train, also owned, maintained and operated by said defendant company and which freight train was also through the gross carelessness and negligence of said defendant company being run and operated by said defendant company upon the same track, in a northerly direction, at a high and dangerous rate of speed; and that the said William B. West was by said collision and by the gross carelessness and negligence on the part of the defendant and without any fault or neglect upon his part was then and there caused to sustain and receive personal injuries which resulted in his immediate death. Plaintiff brings suit in the sum of \$50,000.00 for said killing.

The defendant has filed an answer which after denying each and every material allegation in plaintiff's petition avers that if the said William B. West was injured and killed at the time,

place and in the manner alleged his death was not due to any negligence on the part of the defendant, or any of its servants, agents or employes, but was due solely to the negligence on the part of the said William B. West. Defendant further alleges in its answer that the defendant before entering into the service of this company had executed two certain contracts to the American Express Company by which claims for damages for injuries were waived and released and in which contract he agreed to release any railroad on which he might be working at the time of any injury, and that the plaintiff is now barred from maintaining this action.

Given and defendant excepts.

John H. King, Judge.

2.

You are further instructed that the jury are the sole judges of the weight of the testimony and credibility of the witnesses, but the law of the case is that which is given to you by the Court in these instructions, and you are to be governed by no other law. In determining the weight of the testimony and credibility of the witnesses you have the right to look to each witness as he conducted himself while upon the witness stand, to his fairness or lack of fairness, to his intelligence or his incapacity as the same appeared to you, to his interest in the case, if any, and you have the right to look to each and every surrounding circumstance that appears in the testimony. If there is a conflict between the different parts of the testimony of any witness it is your duty to reconcile the same, if this can be done, upon the theory that each witness has spoken the truth; but if this cannot be done then you may disregard any part of the testimony of any witness, or all of his testimony, as you may see fit under the surrounding facts and evidence in the case. If you believe from the evidence that any witness has wilfully testified falsely to any fact material to the issue in this case, then you are at liberty to disregard any part or the whole of the testimony of such witness.

Given and defendant excepts.

John H. King, Judge.

3.

The burden is upon the plaintiff to sustain her contention by a preponderance of the testimony—By this is meant by the greater weight of the testimony, and not necessarily the number of witnesses testifying upon the one side or the other.

Given and defendant excepts.

John H. King, Judge.

4.

You are instructed that it is the duty of a railway company to so conduct, maintain and run its trains used in its business in such a manner as to prevent injury to persons riding on said trains.

Given and defendant excepts.

John H. King, Judge.

4½.

By "ordinary care" as that term is used in these instructions, is meant that degree of care which a person of reasonable prudence and caution would likely use and exercise under the same or similar circumstances and conditions, and a failure to use such care is negligence on the part of the person or corporation guilty of such failure. That is to say, negligence is the failure to do or perform some act or the doing of some act which, from the nature of the act and under the circumstances, may result in injury or damage to the person or property of others, and which a person of reasonable prudence would or would not do, as the case may be, under the same or similar circumstances, and the rule here stated, applies equally to persons and corporations, the latter, that is, corporations, being chargeable with the negligence, if any, committed by their officers, agents and employees in the discharge of their duty as such.

Given and defendant excepts.

John H. King, Judge.

5.

Now bearing in mind these instructions and applying them carefully to the evidence before you, if you believe and find from a preponderance of the testimony that on or about the 15th day of May, 1908, in the County of Muskogee William B. West was personally injured by being in a wreck caused by a collision between the "Katy Flyer" and one of defendant's freight trains on its line of railroad south of the Arkansas River bridge, and you further find that such injury was the direct or proximate result of the negligence of the defendant, its agents, officers or employees to properly conduct and run its trains on said railroad track; that is, if you so find and believe that the injury sustained by William B. West was the direct or proximate result of the failure of defendant, its officers, agents or employees to exercise that degree of diligence and care to prevent injury to others as a person of ordinary caution and prudence would likely have used under the same or similar circumstances, and you further find that such injury caused the death of the said William B. West, then it will be your

duty to return a verdict in favor of the plaintiff herein for such sum, as, in your judgment, the evidence shows her to be entitled to under other instructions given you in this case.

Given and defendant excepts.

John H. King, Judge.

6.

If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and, determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what probably would have been his lifetime if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition.

Given and defendant excepts.

John H. King, Judge.

7.

Nine of the jury concurring is sufficient to return a verdict for plaintiff or defendant, and if the verdict is rendered by nine or more, but by less than the whole number of jurors, then the jurors who concur in the verdict must sign their names thereto. If the verdict is concurred in by the entire jury, then you will select some one of your number foreman and have him sign the verdict as such foreman and return it into court.

John H. King, Judge.

Endorsed on back as follows.

No. 329 Instructions State of Oklahoma, County of Muskogee, Filed Mar 30 1910 W. P. Miller, District Clerk.

(Title of Cause.)

VERDICT.

We, the jury duly empaneled and sworn in the above entitled cause upon our oaths find the issues in favor of the plaintiff and that she should recover of and from the defendant the sum of \$15,000.00.

R. V. ANDERSON,
Foreman.

Endorsed on back as follows.

No. 329 Verdict R State of Oklahoma, County of Muskogee, Filed Mar 30 1910 W. P. Miller, District Clerk.

(Title of Cause.)

JOURNAL ENTRY OF JUDGMENT.

Now on this the 9th day of April, 1910, the same being a regular judicial day of the February, 1910, term of the District Court for the Third Judicial District, Muskogee county, State of Oklahoma, comes on for hearing before the court the motion for a new trial heretofore filed by the defendant herein and the court having duly considered the same, and after argument of counsel, and being fully advised, overrules said motion for a new trial, to which action of the court in overruling said motion for a new trial the defendant at the time excepts.

Wherefore, it is considered, ordered, adjudged and decreed by the court that the plaintiff shall have and recover of and from the defendant the sum of fifteen thousand (\$15,000.00) dollars, with interest thereon at the rate of seven (7) per cent. per annum, and the costs of this suit, to which judgment and entry thereof the defendant at the time objects and excepts.

Thereupon, and upon the same day, to-wit: the 9th day of April, 1910, and for good cause shown, the defendant is allowed ninety (90) days extension of time within which to make and serve a case-made for the Supreme Court. The plaintiff is given twenty (20) days thereafter within which to suggest amendments, the case to be settled upon five days' notice by either side. The defendant is given ten days to file an appeal bond, and execution is stayed pending the time allowed herein for filing said bond, and upon filing said bond execution herein is further stayed for a period of one hundred thirty (130) days.

JOHN H. KING, Judge.

O. K., S. GRANT HARRIS,
BENJ. MARTIN,

Attorneys for Plaintiff.

Endorsed on back as follows.

In the District Court, Third Judicial District, Muskogee County, State of Oklahoma, Ivolue B. West, Plaintiff, vs. Missouri, Kansas & Texas Railway Company, Defendant. Journal Entry to go in proceedings of Court, April 9th, 1910. State of Oklahoma, County of Muskogee. Filed May 17, 1910. W. P. Miller, District Clerk.

(Title of Cause.)

I.

ORIGINAL OPINION AND FINDINGS OF SUPREME
COURT OF OKLAHOMA, BY WILLIAMS,
JUSTICE.

(Omitting Divisions 2, 3 and 4, which relates to matter not involved in the motions.)

SYLLABUS.

1. Defendant in error's intestate being an employe of the express company, and not of the plaintiff in error (the railway company), but a passenger on its train at the time of being injured, the Federal Employers' Liability Act of April 22, 1908 (35 U. S. Stat., p. 65; U. S. Comp. Stat. 1901, p. 1322), entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," does not apply.

(a) Sections 5945 and 5946, Comp. Laws 1909, apply, as modified by Section 7, Article 23, Constitution of this State.

2. In view of the Kansas statutes making a railroad company liable for all damages done to persons or property in consequence of any neglect on its part (Gen. Stat. 1901, sec. 5857), and for all damages done to any of its employees in consequence of any negligence of its agents or by any mismanagement of its engineers or other employees (Gen. Stat. 1901, sec. 5858), although an express company contracts with the railway company by means of whose trains it carries on its business that it assumes all risk of injury to its employees and undertakes to save the railway company harmless from any claims with respect thereto, and contracts with one of its employees that neither it nor the railway company shall be liable to him for any injury occurring to him while traveling on any of such trains in the course of such employment, such employee may still maintain an action against the railway company for injuries received while so traveling in consequence of the negligence of its agents. (Following *Sewell v. A. T. & S. F. Ry. Co.*, 78 Kan. 17.)

(a) Such contract is also void as being against the public policy of this State as expressed by its Constitution and laws.

3. In an action for injury to a passenger, through a head-end collision of a passenger train and locomotive with a locomotive and freight train, both the passenger and freight train being owned and operated by the plaintiff in error, where the undisputed testimony shows that the accident was caused by the negligence of the plaintiff in error, error in instructing as to the degree of care on the part of the plaintiff in error required is not prejudicial error.

4. The court instructed the jury as follows:

"If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and, determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what would probably have been his lifetime, if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition."

Held, without prejudicial error.

(a) Neither is recovery for loss of society of deceased, or mental anguish, permissible, nor was any permitted by said instruction.

(b) In determining the pecuniary loss on account of the death of the intestate, the loss of the mental, moral and physical training or advice of the parent, in a suit by or for his child or children, may be taken into consideration in determining the amount of damages recoverable.

(c) Recovery may be had only for the loss of such advice or training as would have had pecuniary value, in estimating which, the age and situation of the parties is to be considered, and nothing may be included for the merely sentimental loss.

(d) There must be proof that the intestate was fitted by nature or education, or by disposition, to furnish to his children instruction, or moral, physical or intellectual training or advice, in order for the jury to consider the loss of instruction and moral training or advice as an element of pecuniary damages.

5. When the brief of the plaintiff in error, in any civil cause, fails to preserve, by specification of error, any point complained of in the lower court, such question is thereby waived in this court.

ERROR FROM THE DISTRICT COURT OF MUSKOGEE COUNTY.

John H. King, Trial Judge.

Clifford L. Jackson,

W. R. Allen,

(M. D. Green on brief).

For Plaintiff in Error.

Chas. H. Taylor,

S. Grant Harris,

(Benj. Martin and Jno. D. O'Brien on brief),

For Defendant in Error.

AFFIRMED.

OPINION OF THE COURT, BY WILLIAMS, J.

This proceeding in error seeks to review the judgment of the District Court in an action commenced on July 8, 1909, by Ivolue B. West, the defendant in error, as plaintiff, against the Missouri, Kansas and Texas Railway Company, the plaintiff in error, as defendant, to recover the sum of \$50,000 as damages on account of the death of her husband, William B. West, an express messenger and baggageman on one of the trains of the defendant, said death occurring in a collision of passenger train No. 5, commonly known as the "Katy Flyer," upon which the intestate was riding, with freight train No. 412, near Muskogee, Oklahoma, on May 15, 1908.

The petition is as follows:

"* * * 3. That William B. West, deceased, hereinafter named, left him surviving, as his only heirs at law, the plaintiff herein, his widow, who is thirty-six (36) years of age, and three minor children whose names and ages are as follows, viz: Norma H. West, aged sixteen; Glenford B. West, aged seven years, and Wilmetta M. West, aged two years, and also a posthumous child, born June 29, 1908.

4. That this action is brought by the plaintiff as widow of said William B. West, and for the benefit of herself, as such widow, and of said minor children of herself and of said William B. West, deceased. * * *

5. That at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company, as express messenger upon the express cars operated by said defendant company, over its said line of railroad operated between said city of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas.

That in addition to his duties and employment as express messenger, as aforesaid, said William B. West also engaged in handling passenger baggage upon the express cars of said defendant company.

6. That on May 15, 1908, at about twelve o'clock noon, of said day, said William B. West, in the course of his employment as hereinbefore set out, was riding in one of the express cars of said defendant company, attached to one of the regular trains of said defendant company, being then and there run and operated by said defendant company, over said railroad line in a southerly direction through the State of Oklahoma, which train was one of the regular passenger trains of said defendant, known as "Number Five," and also known as the "Katy Flyer," and that when said train reached a point in said State of Oklahoma, a short distance southerly of the Arkansas river, between the said stations of Verdard and Muskogee, in said State of Oklahoma, said train upon which said William

B. West was so riding in the performance of his duties as aforesaid, was by said defendant railroad corporation, through gross carelessness and negligence, upon its part, and while said train was running at a high and dangerous rate of speed, caused and allowed to collide in what is known as a head-end collision with a locomotive and freight train, also owned, maintained and operated by said defendant company, and which freight train was also then and there, through the gross carelessness and negligence of said defendant company, being run and operated, by said defendant company upon the same track, in a northerly direction, at a high and dangerous rate of speed, and that said William B. West was, by said collision and by said gross carelessness and negligence on the part of said defendant railroad company, in causing and allowing said trains to be so run and operated upon the same track and to collide as aforesaid, and without any fault or neglect, whatsoever, upon the part of said William B. West, then and there caused to sustain and receive such personal bodily injuries as resulted in his immediate death.

9. That the expectancy of life of said William B. West at the time of his death, according to the Carlisle tables of mortality, was twenty-nine and sixty-four one-hundredths years (29 64/100), and that at the time of his death, as aforesaid, said William B. West was but thirty-eight years of age and in good health of body and mind, and of strong physique and was well able to do great mental and manual labor, and to earn at least the sum of eighty-three and thirty-three one-hundredths dollars (\$83.33/100) per month, at his business and employment as express messenger and baggageman as aforesaid, and that at said time was, in fact, actually earning and receiving from his said employment the sum of eighty-three and thirty-three one-hundredths dollars (83.33/100) per month, and that he would (except for his death so resulting from the neglect of said defendant) have continued to earn and receive a much larger sum per month, for at least the period of twenty-nine years (29) thereafter, and in the aggregate, at least the sum of thirty thousand dollars (\$30,000), and that plaintiff herein, and her said children would have received for their own benefit, out of said moneys that said William B. West would have earned (except for his death as aforesaid) an amount in excess of twenty-five thousand (\$25,000) and that plaintiff and her said children have been damaged at the hands of defendant in the loss of the care, aid, advice and society of said William B. West as husband of plaintiff and father of said children in the further sum of at least twenty-five thousand (\$25,000) dollars."

The defendant demurred to plaintiff's petition, on the grounds, (1) no legal capacity to sue for the minor children

named in paragraph three of said petition; (2) defect of parties plaintiff, in that the suit is brought in the name of Ivolue B. West as plaintiff, while in paragraph four of said petition it is stated that the suit was brought by the plaintiff for the benefit of herself and the minor children named in paragraph three of said petition; (3) facts sufficient to constitute a cause of action on behalf of the plaintiff not stated in the petition.

The demurrer having been overruled, and exceptions saved, the defendant answered, (1) denying any negligence on its part, but averring contributory negligence on the part of the intestate; (2) that the train described in the petition as "Number Five," or the "Katy Flyer," was an interstate train, engaged in the movement of interstate commerce; (3) that prior to the time of the alleged injury in question, the said William B. West had made application to the American Express Company in writing for employment by it as driver of one of its wagons at Parsons, Kansas, and was so engaged pursuant to the terms of a written contract, said contract being dated January 9, 1893. Said contract is in part as follows:

"Whereas, I, the undersigned, have entered, or am about to enter, the employ of the American Express Company, and in the course of such employment may be required to render services in the care, carriage or handling of merchandise and property in the course of transportation by cars, vessels and vehicles belonging to the different railroad, stage and steamboat lines upon which the company relies for its means of forwarding property delivered to it to be forwarded;

And whereas, such Express Company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employees:

Now therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel or vehicle, or of any employee of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death

result from the gross negligence of any person or corporation, or of any employe of any person or corporation, or otherwise.

And I hereby bind myself, my heirs, executors and administrators, with the payment to such Express Company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

I do further agree that in case I shall at any time suffer any injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning and operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

I do hereby ratify all agreements heretofore made by said Express Company with any corporation or persons operating any railroad, stage or steamboat line in which such Express Company has agreed in substance that its employees shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements insofar as the provisions thereof relative to injuries sustained by employes of the Company are concerned, as fully as if I were a party thereto.

And I do hereby authorize and empower said Express Company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporations or persons operating any railroad, stage or steamboat line, *for my transportation as a messenger or employee free of charge* (italics ours), upon the condition and consideration, that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employe of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and to all persons upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons."

That the intestate, prior to the time of the alleged injury in question, made application to the American Express Company in writing for employment by it as an express messenger, and

that pursuant to said application he was, prior to and at the time of the alleged injury in question, employed by the said American Express Company, under a contract in writing between him and said company, which contract was dated October 15, 1896, a copy of which is attached to said answer as a part thereof, as "Exhibit B." This contract also includes as a part of its provisions the contract hereinbefore designated and referred to as "Exhibit A."

It is pleaded that by the terms of said contract identified as "Exhibit B," it was provided that in consideration of the premises and of the employment of deceased, he did assume all risk of accident and injury which he should meet with or sustain in the course of his employment, whether occasioned or resulting by or from the gross or other negligence of said corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employe of any such corporation or person, or otherwise, and whether resulting in his death or otherwise. Said contract referred to as "Exhibit A" is in part as follows:

"Whereas I, the undersigned, have entered, or am about to enter, the employment of the American Express Company, and in the course of such employment may be required to render services in the care, carriage or handling of merchandise and property in the course of transportation by cars, vessels and vehicles belonging to the different railroad, stage and steamboat lines upon which the company relies for its means of forwarding property delivered to it to be forwarded;

And whereas, such Express Company, under its contracts with many of the corporations and persons owning or operating such railroad, stage or steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employees;

Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicles, or of any employe of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation, or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death

result from the gross negligence of any person or corporation, or of any employe of any person or corporation, or otherwise.

And I hereby bind myself, my heirs, executors and administrators with the payment to such express company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

I do hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage or steamboat line in which such express company has agreed in substance that its employes shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every of such agreements in so far as the provisions thereof relative to injuries sustained by employes of the company are concerned, as fully as if I were a party thereto.

And I do hereby authorize and empower said express company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporation or persons operating any railroad, stage or steamboat line, for my transportation as a messenger or employe free of charge, upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporation or persons, or of any employe of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and of all persons upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the neg-

ligence of said company, or any of its members, officers, agents, or employes, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith."

It is further recited in the answer that

"Defendant admits that at and prior to the death of the said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of railroad between the city of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas, and admits that the deceased, William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express car of the said defendant railway company, and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by the said American Express Company, and that such handling of such baggage by said West was for and in behalf of and under the direction of said railway company."

Plaintiff replied that said contracts, identified as Exhibits "A" and "B" were void; that "by virtue of the laws and statutes duly existing in the said State of Kansas, all railroad companies operating within said State of Kansas were liable for all damages done to persons or property, if done in consequence of any negligence upon the part of said railroad companies, and by the laws and statutes of said state all contracts by which it was attempted to release any railroad company from such damages was void as being in violation of said laws and statutes and of the public policy of the State of Kansas, and that said laws and statutes ever since have and still do exist and are in force in said State of Kansas, and that said contract was wholly without consideration;

"That by reason of the existence of said laws and statutes and the want of consideration, aforesaid, the said pretended contract or the evidence thereof purporting to exist in Exhibits 'A' and 'B' attached to the answer of the defendant were and are wholly void and of no effect."

Defendant demurred to said reply, which was overruled and exceptions saved.

Defendant then filed a rejoinder to plaintiff's reply. On the issues thus made the cause was tried before a jury and a verdict returned in favor of the plaintiff in the sum of \$15,000.

1. The plaintiff in error insists that the liability of the plaintiff in this case is controlled entirely by the Act of Congress commonly known as the "Employers' Liability Act," under which the only person entitled to sue is the personal representative of the deceased.

The act of April 22, 1908, (35 U. S. Stat., p. 65; U. S. Comp. Stat. 1901, p. 1322), entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," provides:

"Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Section 5 of said act also provides:

"That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void; provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Section 7 of said act provides further:

"That the term 'common carrier' as used in this Act shall include the receiver or receivers or other persons or corpora-

tions charged with the duty of the management and operation of the business of a common carrier.'

It is insisted that the intestate was not in the employ of the plaintiff in error, but in that of the American Express Company. Under the issues as framed, said intestate was an employee of the express company and not of the railroad company. This is not an action by the defendant in error against the American Express Company, the intestate's employer, in which event, if the express company comes within the term of a common carrier by railroad, the Act of Congress of April 22, 1908 would apply.

Plaintiff in error in its reply brief insists that under the pleadings it avers that defendant in error's intestate was an employee of the railway company. The defendant in error in her petition alleges as follows:

"That in addition to his duties and employment as express messenger, as aforesaid, the said William B. West also engaged in handling passenger baggage upon the express cars of the defendant company."

In the third amended answer of the plaintiff in error, after admitting the truth of this allegation, the plaintiff in error further alleges that the deceased

"was also engaged in handling passenger baggage upon the express car of the said defendant railway company, and the defendant railway company states that the said William B. West, deceased, in performing said duties in handling said baggage, *was doing so under and by virtue of his said employment by the said American Express Company* (italics ours), and that such handling of such baggage by said West was for and in behalf of and under the direction of said railway company."

The plaintiff in error thereby expressly adopting the terms of said employment by the American Express Company, which was in writing, said contracts in writing being attached to the answer as exhibits, and which show that the defendant in error's intestate was an employee of the American Express Company, and not of the railway company.

There is no dispute but that the intestate handled express and baggage between points in one state, and also between points in another state, but, in doing this, under the pleadings in this record, he was the employee of the express company and acting for the express company in handling such baggage. Obviously, this was done by virtue of a contract between the express company and the railway company, but the railway company neither saw fit to plead this contract nor to offer it in evidence, and the presumption is that had proffer been made of this contract it would have been against the contention of the plaintiff in error.

Paragraph 2 of the syllabus in *A. T. & S. F. Ry. Co. v. Davis & Young*, 26 Okla. 359, 109 Pac. 551, is as follows:

"When it is reasonably within the power of a party to offer evidence upon the facts and rebut the inferences which the circumstances tend to establish against him, and he fails to offer such proof to rebut same, the natural conclusion is that the proof, if produced, would support the inferences against him, and the jury is justified in acting upon that conclusion."

Nowhere in this record is any offer made to produce this contract or to show what the contract was. On the contrary, it appears from the record that the railway company sought to prove by circumstances what such contract was, without showing the contract or proving its contents. This of itself would indicate that if this contract were in evidence it would be fatal to their contention. However, the evidence offered for the purpose of showing that the defendant in error's intestate was an employee of the plaintiff in error, which was excluded by the court, is not properly presented under the rules of this court here for review.

Rule 25 is as follows:

" * * * The brief shall contain the specifications of the errors complained of, separately set forth and numbered; * * * "

The specifications of error in the brief of plaintiff in error are set out, beginning with page 71 and ending with page 81. Specifications of error numbered 2, 3 and 4, relate to the rejection of evidence. Specification No. 2 is as follows:

"The trial court erred in refusing to admit in evidence the application for a situation of William B. West with the Express Company, which application contained the accident release executed by the said William B. West, the benefits of which inured to this plaintiff in error. Said application for situation and accident release being marked 'Defendant's Exhibit A.'"

Specification No. 3 is as follows:

"The trial court erred in refusing to admit in evidence the application for a situation of William B. West with the Express Company, which application contained the accident release executed by the said William B. West, the benefits of which inured to this plaintiff in error. Said application for situation and accident release being marked 'Defendant's Exhibit B.'"

Specification No. 4 is as follows:

"The trial court erred in refusing to admit in evidence the application for a situation of William B. West with the Express Company, which application contained the accident release executed by the said William B. West, the benefits of which inured to this plaintiff in error. Said application for

situation and accident release being marked 'Defendant's Exhibit C.'"

No specifications of error having been predicated upon the exclusion of any other evidence tending to show that defendant in error's intestate was an employee, the same is not properly before this court for review, and for that reason we do not consider the same; for the further reason in the brief and argument of plaintiff in error, beginning with page 82 and ending with page 146, such is not attempted to be insisted upon or urged as error.

In *Noble State Bank v. Haskell et al.*, 22 Okla. 48, 97 Pac. 590, paragraph 7 of the syllabus is as follows:

"When the brief of the plaintiff in error, in any civil cause, fails to preserve, by specification of error, any point complained of in the lower court, such question is thereby waived in this court."

In addition to that, in the brief and argument the point is not urged, and the same cannot be cured by a reply brief when the same is not predicated upon a specification of error, permission not having been first obtained for the purpose of amending the specifications of error. No such permission has been asked for or granted in this cause.

Under the issues as made, section 5945, Comp. Laws 1909 (Sec. 4313, Stat. Okla. Ter. 1893) applies. Said section is as follows:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Section 5946, Comp. Laws 1909 (Section 4314, Stat. Okla. Ter. 1893; Section 4612, Wilson's Rev. and Ann. St. 1903) provides:

"That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in section 5945 of this article, is or has been at the time of his death in any other State or Territory, or when, being a resident of this State, no personal representative is or has been appointed, the action provided in said section 5945 may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

In the petition it is averred that the accident occurred in the State of Oklahoma; that the intestate at that time resided

at Parsons, in the State of Kansas. The evidence in the record supports such averment. The action appears to have been properly brought. *Okla. Gas & Electric Co. v. Lukert*, 16 Okla. 397.

The limitation of section 5945, *supra*, was removed by section 7, article 23 of the Constitution, which provides:

"The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

Sections 5945 and 5946, as modified by section 7, article 23, *supra*, were brought over by section 2 of the Schedule to the Constitution. *Tilley v. Overton*, 29 Okla. 292, 116 Pac. 945; *Olson v. Logan County Bank*, 29 Okla. 391; *Mayor and Councilmen of City of Pawhuska v. Pawhuska Oil & Gas Co. et al.*, 28 Okla. 563, 115 Pac. 353; *Ex parte McNaught*, 23 Okla. 285; *Ex parte Cain*, 20 Okla. 125.

Under the undisputed evidence in the record the American Express Company paid the intestate his salary, the railway company paying the express company for the handling of the baggage.

In *Sewell v. A. T. & S. F. Ry. Co.*, 78 Kan. 17, in the opinion on rehearing, it was held:

"In view of the Kansas statutes making a railroad company liable for all damages done to persons or property in consequence of any neglect on its part (Gen. Stat. 1901, sec. 5857), and for all damages done to any of its employees in consequence of any negligence of its agents or by any mismanagement of its engineers or other employees (Gen. Stat. 1901, sec. 5858), although an express company contracts with the railway company by means of whose trains it carries on its business that it assumes all risk of injury to its employees and undertakes to save the railway company harmless from any claims with respect thereto, and contracts with one of its employees that neither it nor the railway company shall be liable to him for any injury occurring to him while traveling on any of such trains in the course of such employment, such employee may still maintain an action against the railway company for injuries received while so traveling in consequence of the negligence of its agents."

Under the laws of Kansas, as construed in said case by the highest court of that State, such contracts with the express company did not prevent the widow of the intestate from suing the railroad company for damages on account of his death.

It is not essential to determine whether the law of the place where said contract was entered into or the place where the injury occurred applies.

Section 36, Article 9, of the Constitution of this state, known as the Fellow Servant Act, defines the rights of the employees of railway companies in this state, at least as to intrastate matters.

By section 13 of article 9, the plaintiff in error is permitted to issue or give a free pass or free transportation, for use within this state, to defendant in error's intestate as an expressman. By section 8, article 23, said intestate was not permitted, by any contract or agreement, express or implied, to waive a right to recover for negligence as a passenger thereon by virtue of such free pass, for, by sections 2 and 6 of article 9, the plaintiff in error is made a common carrier and a public highway, and thereby owed the defendant in error's intestate certain duties as a passenger, though he be traveling on free transportation. (See, also, sec. 6, art. 23.) In addition to that, it is the decidedly prevailing doctrine in this country that a passenger carrier cannot contract against the consequences of his own negligence when the carriage of the passenger himself is the subject of the contract. 2 Hutchinson on Carriers, 3rd Ed. (Matthews and Dickinson), section 1072, p. 1245, and authorities cited in foot note 47.

In either event, this contract is void as against public policy, on account of being in contravention of the laws of the State of Kansas and against the public policy of this State. (Secs. 1123 and 1124, Comp. Laws 1909.)

(Divisions 2, 3 and 4 are omitted as not being involved in the motions.)

5. As to the specification of error predicated upon the court's instructing the jury that three-fourths of their number could return a verdict, this contention is without merit. Section 19, article 2 (Bill of Rights) Constitution; running section 27 (Williams' Ed.) and citations; St. Louis & S. F. R. Co. v. Rushing et al., 120 Pac. 973.

The judgment of the lower court is affirmed.

All the Justices concur.

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA.

II.

OPINION AND FINDINGS OF SUPREME COURT OF
OKLAHOMA ON RE-HEARING,

(Reported in 134 Pacific Reporter, Pages 655-661.)

(Title of Cause.)

SYLLABUS.

1. In an action brought by a widow under a state statute against a railway company for damages for injury suffered by her husband which resulted in his death, the petition alleged that the deceased was employed by the American Express Company as an express messenger; that in addition to his duties as an express messenger, he handled the personal baggage of the inter- and intra-state passengers of the railway company which was engaged in interstate commerce. The answer of the defendant admitted the foregoing allegations and further alleged that the deceased "in performing said duties in handling said baggage was doing so under and by virtue of his said employment by the said American Express Company." HELD, That the pleadings disclose that the deceased, a resident of the State of Kansas, suffered the injuries which resulted in his death while he was employed by the American Express Company as an express messenger and not while he was employed by the railway company in interstate commerce, and that the action was properly brought by the widow under the state law.

2. Evidence on the question of employment EXAMINED and HELD not to be in conflict with the allegations contained in the petition, the admissions of the answer or the evidence of the plaintiff to the same effect. That said evidence, construed as a whole and in connection with the pleadings, merely supplements the admissions of fact contained in the pleadings by disclosing that the deceased received his entire salary for all the work performed by him from the express company; and that he was rightfully upon the train of the railway company by virtue of an arrangement between the two companies whereby in consideration of the work performed for the express company in handling baggage, the railway company agreed to pay to the express company one-half the sum so paid.

3. An express messenger, employed and paid solely by an express company and entitled under an arrangement between the express company and a railway company to ride on the trains of the railroad company in discharge of his duties, is a passenger while on such train in the discharge of his duties and entitled to the same degree of protection.

4. The contracts of employment containing waiver clauses offered in evidence by the defendant were properly excluded: (1) Because it was not clearly shown that the contracts covered the employment in which the decedent was engaged at the time of his death; (2) The waiver clauses are void under the laws of the State of Kansas where said contracts were executed; (3) The waiver clauses are void under Sections 7 and 8, Article 23, Williams' Const., which provide:

"Sec. 7. The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

"Sec. 8. Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void."

5. By Sec. 2907, Comp. Laws, Okla. 1909, the measure of damages for the breach of an obligation not arising from contract is the amount which will compensate for all the detriment proximately caused thereby.

6. The court gave the following instruction: "If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and in determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what wou'd probably have been his lifetime, if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition." HELD, not error.

7. The court below refused to give the following instruction: "If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained, and you are not to permit your sympathy to influence your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish. Your verdict must be based upon the financial loss in dollars and cents." HELD, not error.

8. In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct, both in form and in substance, and such that the court might give to the jury without modification or omission. If the

instruction as requested is objectionable in any respect its refusal is not error.

9. The amount of damages recoverable in actions for death by wrongful act is peculiarly a question for the jury; and the general rule is, that the verdict of the jury will not be reversed on the ground that the damages are excessive, unless the damages are so large as under the circumstances to shock the sense of justice or to indicate that they were the result of prejudice and passion on the part of the jury.

10. The instructions given by the court below correctly confined the amount of recovery to the pecuniary loss sustained by the widow and children of the deceased. In our judgment, there is sufficient evidence in the record to sustain the verdict of the jury under the most limited interpretation that can be placed upon the instruction given.

(Syllabus by the Court.)

APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY.

John H. King, Trial Judge.

AFFIRMED.

ON RE-HEARING.

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OPINION OF THE COURT, BY KANE, J.

This was an action for damages for personal injuries resulting in death, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. The deceased was the husband of the plaintiff and the injury which resulted in his death was occasioned by a collision between passenger train No. 5, commonly called the "Katy Flyer" and freight train No. 34. The primary cause of the collision was the violation of a dispatcher's train order by train No. 34, whereby the freight train, which was northbound, departed from the yards at Muskogee ahead of time and on the time of the southbound passenger train with which it collided. The

collision occurred on the main line of the Missouri, Kansas & Texas Railway Company in Oklahoma, at a point between two and three miles north of Muskogee and just south of the Arkansas River. There was no dispute as to the collision, the cause of it, or that it resulted in the death of Mr. West, the husband of the plaintiff. The deceased and the plaintiff were residents of the State of Kansas. No personal representative was appointed and this action was commenced by the widow in her own name for the benefit of herself and four minor children, the fruit of her marriage with the deceased, under a state statute which provides for such actions. It is alleged in the petition that "at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by said defendant company over its said line of railroad between said city of Parsons, Kansas, through the State of Oklahoma to points beyond in the State of Texas; that in addition to his duties and employment as express messenger, as aforesaid, said William B. West also engaged in handling passenger baggage upon the express cars of said defendant company." The answer of the defendant was, (1) a general denial; (2) that even if the deceased was injured and killed at the time and place and in the manner alleged in the petition, that his injuries and death were not due to any negligence on the part of the defendant; and (3) that the defendant is a common carrier engaged in commerce between the several states; that the passenger train described by plaintiff in said petition as the "Katy Flyer" was at all times mentioned therein an interstate train, engaged in the movement of interstate commerce, and that said freight train, starting from Muskogee in the State of Oklahoma and proceeding on its line of railway to Parsons, in the State of Kansas, was at all times mentioned in plaintiff's petition, engaged in moving interstate commerce.

The three succeeding paragraphs of the answer referred to three separate contracts of employment, which it is alleged were made and entered into by and between the deceased and the American Express Company, the first two being executed in 1893, and the third in 1896. It is then alleged in effect that by the terms of said contracts, it is provided that in consideration of the premises and of the employment of the deceased by the express company, he was to assume all risk of accident and injury which he should meet with or sustain in the course of his employment whether occasioned or resulting by or from the gross or other negligence of the railway company upon whose lines his duties were to be performed, and whether resulting in his death or otherwise. That in case of any injury suffered by deceased, he would at once, without demand, and at his own expense, execute and deliver to the cor-

poration or person owning or operating the railroad, stage or steamboat line upon which he should be so injured, a good and sufficient release under his hand and seal of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom, etc. The answer closes with the following averment:

"Further answering, defendant admits that at and prior to the death of the said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of railroad between the City of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas, and admits that the deceased, William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express cars of the said defendant railway company, and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by the said American Express Company, and that such handling of such baggage by said West was for and in behalf of and under the direction of said railway company."

The reply in effect denied each and every allegation in the answer contained, save as in the petition stated, or as herein-after admitted, stated or qualified, and alleged that if the instruments mentioned in the answer were ever signed by William B. West, they were so signed and entered into in the State of Kansas during the years 1893 and 1896, and that by virtue of the laws of the State of Kansas, and for want of consideration said pretended contracts, or the evidence thereof purporting to exist in Exhibits A and B attached to the answer of the defendant were and are wholly void and of no effect. To this reply the defendant filed a general denial. Upon the issues thus joined, the cause was tried to a jury which returned a verdict in favor of the plaintiff in the sum of \$15,000, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

By a former opinion of this Court, the judgment of the court below was affirmed, and the cause is now before us upon a rehearing. The cause was ably and fully briefed and argued orally upon the original submission and again upon rehearing by counsel for both sides. After a careful re-examination of the record and briefs and the points presented by counsel in their oral arguments, we are still of the opinion that the conclusion formerly reached is correct. The assignments of error may all be grouped under the following heads: (1) The de-

fendant in error herein is not the proper party to maintain this action; (2) Error of a court below in giving certain instructions, and refusing to give certain instructions which presented the same issue in another way; (3) The trial court erred in declining to admit in evidence the three written contracts attached to the answer pertaining to the employment of the deceased by the express company; (4) The amount of damages awarded is excessive.

The first assignment is based upon the theory that the pleadings and evidence show that the deceased suffered the injury which resulted in his death while he was employed by the railway company in commerce between the states within the meaning of the Act of Congress relative to the liability of common carriers by railroad to their employees in certain cases, and therefore the cause of action accrued to the personal representative of the deceased for the benefit of the surviving widow and children. This contention cannot be sustained. It is specifically alleged in the petition that the deceased "was employed by the American Express Company as an express messenger." This is the only allegation to be found in the petition that attempts to state specifically by whom the deceased was employed, and there are no allegations elsewhere in the petition which necessarily negative that positive statement, or from which it may be reasonably inferred that the deceased was also employed by the railway company. But if the clear meaning of the specific allegation of the petition upon that point was clouded by the allegation which immediately follows it, to the effect that the deceased was also engaged in handling passenger baggage upon the express car of said defendant railway company, the answer of the defendant makes the situation entirely clear. In its answer the defendant, by way of admission, uses the language of the petition, "that at and prior to the time of the death of said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of railroad between the city of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas, and admits that the deceased, William B. West, in addition to his employment as express messenger by the said American Express Company, was also engaged in handling passenger baggage upon the express car of the said defendant railway company," and immediately adds, "and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by the said American Express Company."

The foregoing admissions are in entire harmony with the balance of the answer, which contains allegation after allegat-

tion positively stating that the deceased was employed by the express company continuously for a great many years prior to his death, and the contracts of employment between the express company and the deceased are attached to the answer and made a part thereof, and certain waivers contained therein are relied upon as a defense.

From the pleadings alone it is clear that the deceased suffered the injuries which resulted in his death while he was employed by the express company, and not while he was employed by the railway company; and that the parties did not attempt to join an issue of fact upon that question. Counsel for the railway company seem to base their contention on this point, solely upon the theory that the allegation to the effect that the deceased was also engaged in handling personal baggage in addition to his duties as express messenger is sufficient to create the presumption that he was jointly employed by the railway company, and cites *M. K. & T. Ry. Co. v. Reaser*, (Tex.), 68 S. W. 332; *Vary v. C. B. R. & M. Ry. Co.*, 42 Ia. 246, and *Oliver v. Northern Pac. Ry. Co.*, 195 Fed. 432, as being authority to that effect. Those cases are so clearly distinguishable from the one at bar that we do not deem it necessary to notice them further than to say that in our judgment they are in no way in conflict with the conclusion herein reached. It is not disputed that the deceased handled interstate baggage, but the answer explains that in handling said baggage he was doing so under and by virtue of his said employment by said American Express Company. Moreover, there are no averments in the pleadings from which an inference may be reasonably drawn that any contract of employment was ever entered into between the deceased and the railway company.

The language of the Act of Congress carries with it the idea and the essence of a contract. To be employed by one is to be engaged in his service, to be used as an agent or substitute in transacting his business, to be commissioned and entrusted with the management of his affairs. In our judgment, the words, "while employed by such carrier," construed in connection with the context, is equivalent to "while hired by such carrier," which implies a request and a contract for compensation. The persons falling within the meaning of the act are those hired by the railway company, or those who are working for it at its request and under an agreement on its part to compensate them for their services. *U. S. v. Nourse*, Case No. 15901, 27 Fed. Cases; *McClusky v. Cromwell*, 11 N. Y. 593; *Bingham, Executrix, v. Scott*, 177 Mass. 208. The case of *M. K. & T. Ry. Co. of Texas v. Blalack*, 147 S. W. 559, is directly in point on the question now under consideration. In that case the railroad company pleaded that Blalack was in its employ at the time he was injured, but the only proof of employment was

that Blalack handled baggage which was the work of an employe of the railway company. The court said:

"Where, in an action against a railroad company for negligent death, the evidence of plaintiff showed that decedent was an agent of an express company, employed and paid by it, and entitled to ride on the trains of the railroad company, under a contract between the two companies, and that he was killed through the negligence of the employes in charge of the train, the railroad company, engaged in interstate commerce, must show that plaintiff's claim was unfounded, and that decedent was in its employ, to avail itself of the Federal Employers' Liability Act. (Act April 22, 1908, c. 149, 35 Stat. 65—U. S. Comp. St. Supp. 1911, p. 1322); and where it failed to do so, the state law will govern the right to recover."

On re-hearing it is contended that the evidence adduced at the trial disclosed that the injury was suffered while the deceased was employed by the railway company and that, even if no issue of fact on the question of employment was joined by the pleadings, the case as to parties must be governed by the Employers' Liability Act. It is familiar law that if during the course of the trial it develops that the real case is not controlled by the state statute, but by the federal statute, and the case is commenced under the former, the case pleaded is not proved and the case proved is not pleaded. *St. Louis & S. F. Ry. Co. v. Seale*, 229 U. S. 156. But in our judgment, that rule is not applicable here. The evidence of Mr. Adams, an officer of the express company, relied upon by counsel, is in no way inconsistent with the allegations of the petition and the admissions of the answer, to the effect that the deceased was employed by the express company at the time of his death. It is true that Mr. Adams testified that the deceased "was a joint messenger and baggage man" and that "he worked for both companies," (which expressions under proper circumstances might be held sufficient to take the case to the jury on the question of employment. (*Ry. Co. v. Reaser*, *supra*), but upon cross-examination it was clearly shown that the witness merely drew erroneous conclusions from admitted facts and that his testimony as a whole supplemented the allegations of the petition and the admissions of the answer by more fully disclosing the relations existing between the express company and the deceased, and the express company and the railway company, and made it more clearly apparent that the decedent was rightfully on the train. Construing the allegations of the petition, the admissions contained in the answer, and the evidence of Mr. Adams together, a state of facts is disclosed almost identical with that in the *Blalack* case, *supra*. From a careful investigation of the entire record, we are persuaded that if we should reverse the judgment of the court below upon

the ground that the deceased suffered the injuries which resulted in his death while he was employed by the railway company, we would compel the widow to abandon the tenable theory upon which she brought the case and to accept one less advantageous to her and her children and one which it would be difficult, if not impossible, to establish.

We, therefore, find with the court below that the pleadings and the evidence conclusively show that the deceased suffered the injuries that resulted in his death while he was employed by the express company, and not while he was employed by the railway company in interstate commerce within the meaning of the Federal Employers' Liability Act. It follows that under the issues joined and the evidence adduced the action was governed by Sections 5945 and 5946, Comp. Laws, Okla. 1909, as modified by Section 7, Art. 23, Williams' Constitution. The first of these sections provides for an action for injury resulting in death by wrongful act, which must inure to the widow and children, if any, or next of kin; the second, that where the residence of the party whose death has been caused, as set forth in Section 5945, is at the time of his death a resident of any other state or territory and no personal representative has been appointed, the action provided for in said section may be brought by the widow. And the constitutional provision provides that,

"The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

The second contention is predicated upon the following action of the court: The court instructed the jury as follows:

"If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss, sustained by the widow and children of the deceased, and in determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what would probably have been his lifetime, if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff's petition."

The plaintiff in error requested the court to charge the jury as follows, which request was refused:

"If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained, and you are not to permit your sympathy to influence your verdict. The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish. Your verdict must be based upon the financial loss in dollars and cents."

The principal ground of complaint as to the instruction given is that the term, "pecuniary loss," as used therein does not state with sufficient detail the specific elements of damage which the jury were permitted to take into consideration in assessing the amount of recovery. In our judgment, the instruction given is sufficiently clear to enable the jury to properly assess the damages, and is in accord with Sec. 2907, Comp. Laws, Okla. 1900, which provides that,

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

Where the instruction given reasonably and fairly presents the issue involved, the judgment of the court below will not be disturbed on appeal because a requested instruction which presented the same issue in another form was refused. Especially is this true when the instruction requested upon the same issue was less accurate in its statement of the law than the instruction given. The requested instruction was erroneous in several particulars. The first clause is misleading, for the reason that the statute upon which the action is based clearly provides and contemplates that the measure of damages shall be such amount as will fully compensate both the widow and the children, for whose benefit the action accrues. The first clause of the requested instruction is that the verdict of the jury should be for such an amount as would compensate the plaintiff for the actual loss sustained, and does not mention the children. The latter part of the instruction is also objectionable, for the reason it does not mention the right of the minor children to compensation for any pecuniary loss they may sustain in respect to the society of the father, as involved in the elements of fatherly care, advice and moral instruction and education. It is well settled that in order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct, both in form and in substance, and such that the court might give to the jury without modification or omission. If the instruction as requested is objectionable in any respect its refusal is not error. A party cannot complain that the court did not, of its own motion, modify and correct the request and then give it as corrected. No such duty rests upon the court. When a part only of a requested instruction is erroneous, the whole may properly be refused. *Blashfield on Instructions to Juries*, Sec. 137.

The third assignment of error arises out of the action of the court in refusing to admit in evidence the contract of employment containing the waivers. We do not think the action of the court below in that regard was erroneous. In the first

place it is not clear that the contracts offered cover the employment in which the deceased was engaged at the time of his death. That would be a sufficient ground for excluding them. It also appears that the contracts were Kansas contracts. If we hold that they must be construed according to the laws of that state, we find that under the laws of Kansas, as construed by the highest court thereof, the waiver clause is held to be void. *Sewell v. A. T. & S. F. Ry. Co.*, 78 Kan. 17. And if we hold that the contract is by its terms tied to the tort and the law of the place of the tort must govern, (*Smith v. A. T. & S. F. Ry. Co.*, 194 Fed. 79), as the cause of action arose since statehood, we must hold the waiver clause void under Section 8, Article 23, Williams' Constitution which provides that,

"Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void."

From an examination of the record, we are not prepared to say that the verdict is excessive. The amount of damages recoverable in actions for death by wrongful act is peculiarly a question for the jury; and the general rule is that the verdict of the jury will not be reversed on the ground that the damages are excessive, unless the damages are so large as under the circumstances to shock the sense of justice or to indicate that they were the result of prejudice and passion on the part of the jury. 8 Am. & Eng. Enc. of Law, 2nd ed., p. 912, 932.

Section 2907, Comp. Laws, Okla. 1909, provides that,

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

The instruction given by the court below correctly confined the amount of recovery to the pecuniary loss sustained by the widow and children of the deceased. In our judgment, there is sufficient evidence in the record to sustain the verdict of the jury under the most limited interpretation that can be placed upon the instruction given.

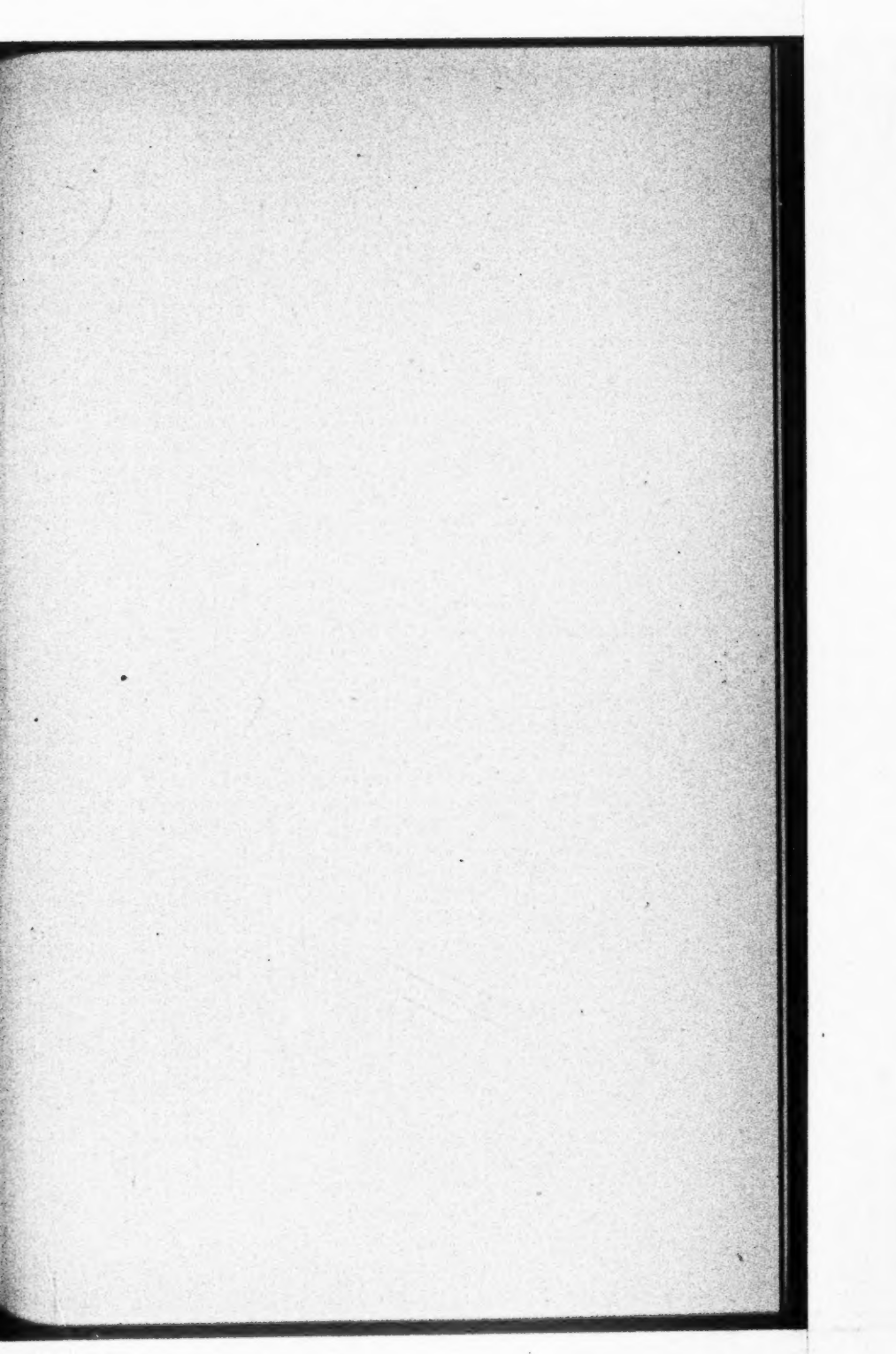
The evidence is to the effect that deceased was 38 years of age, in good health of body and mind, with an earning capacity of \$83.33 per month at the time of his death; that his earning capacity steadily increased from the date of his employment by the express company to the time of his death, his salary having been advanced four times during that time. The evidence also showed that he was a man of good habits, industrious, ambitious, attentive to his family and that he contributed to the support of his wife and family all of his salary, except from three to five dollars per month which he retained for his per-

sonal expenses. His expectancy of life was admitted to be 29.62 years. The family consisted of a wife, two years younger than the deceased, and four minor children, one of whom was born after his death. Considering the education and clothing of the children and their increasing expense it may be reasonably inferred that each would fairly require its proportionate share of the earnings. There is evidence reasonably tending to show that the deceased would have apportioned among the members of his family a preponderating share of his salary. Upon the basis of an equal division, the widow and children would receive as their portion of his earnings the sum of \$24,682.14 during his expectancy. This computation does not take into account what might have been saved from the earnings of deceased during his lifetime and made to produce interest, nor any damage occasioned to the children on account of loss, of mental, moral or physical training or advice of the father. It was shown that the cash earnings during the expectancy of the deceased at the rate proven would have reached approximately \$30,000. We think that in view of the large family entitled to support from those earnings, and the proven thrift, industry, frugality and advancement being made by the deceased at the time of his death, and his generous contributions to the support and maintenance of the wife and children, the verdict by the jury of \$15,000, just one-half of the cash earnings of the deceased during his expectancy, is not excessive. The following are a few of the cases where substantial verdicts under somewhat similar circumstances have been sustained:

Louisville Ry. Co. v. Snivells (Ky.), 18 S. W. 944;
 Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277;
 East Line, etc., Ry. Co. v. Smith, 65 Tex. 167;
 Reilly v. Brooklyn Heights R. Co., 55 N. Y. App. Div. 453;
 St. Louis, etc., Ry. Co. v. Cleere (Ark.), 88 S. W. 995;
 Chesapeake, etc., Ry. Co. v. Hendricks, 85 Tenn. 717;
 M. K. & T. Ry. Co. v. Williams, (Tex.) 117 S. W. 1043;
 Harris v. Puget Sound El. Ry. Co., (Wash.) 52 Wash.
 289;
 M. K. & T. Ry. Co. v. McDuffey, 109 S. W. 1104;
 Boyce v. N. Y. City Ry. Co., 110 N. Y. Sup. 393.

Finding no reversible error in the record, the judgment of the court below is affirmed.

All the Justices concur, except Dunn, J., absent.



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IN THE
SUPREME COURT OF THE UNITED STATES.

MISSOURI, KANSAS & TEXAS RAIL-
WAY COMPANY, NATIONAL
SURETY COMPANY and AMERICAN
SURETY COMPANY OF NEW YORK,
Plaintiffs in Error,

No. 696.

vs.

IVOLUE B. WEST,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

**REPLY TO BRIEF ON MOTIONS OF DEFENDANT
IN ERROR TO DISMISS OR AFFIRM.**

Counsel for defendant in error have filed in this Court motions to dismiss the writ of error or to affirm the judgment and have filed brief in support of these motions. The motions are as follows, omitting caption and signatures:

“Comes now the defendant in error, Ivolue B. West, by her attorneys of record herein, and moves this Honorable Court:

First. To dismiss the writ of error herein, on the ground that this Court has not jurisdiction thereof, no federal question being involved (Rule 6).

Second. To affirm the judgment and decision of the courts of the State of Oklahoma, on the ground that it is manifest that the writ of error was taken for delay only and on the ground that even if this Court has some jurisdiction in the case, the questions upon which the same depend are so frivolous as not to need further argument."

STATEMENT AS TO THE APPENDIX TO THIS BRIEF.

Counsel for defendant in error have attached to their brief an appendix containing certain portions of the record deemed necessary by them in a consideration of these motions.

Counsel for plaintiffs in error believe that the appendix prepared by counsel for defendant in error does not contain certain portions of the record proper to be considered in connection with these motions and there is likewise attached to this brief an appendix containing such portions of the record as counsel for the plaintiffs in error deem necessary to be considered by this Court.

The appendix to this brief contains the following portions of the record:

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STATEMENT OF THE CASE.

Counsel for defendant in error have incorporated in their brief what they represent to be the facts in this case. It is submitted that their statement is not in all respects in accordance with the facts as presented in this record and that it is also deficient in many important respects.

In the argument in this brief in opposition to these motions the attention of this Court will be called to these inaccuracies and deficiencies, but in order that this Court may have a clear understanding of this case before considering the specific points made in the argument, counsel for plaintiffs in error will here briefly state its character.

This suit was instituted by Ivolue B. West in the District Court of Muskogee County, State of Oklahoma, to recover damages for injuries on account of the death of her husband, William B. West, who was killed in a collision of two trains, which occurred on the main line of the Missouri, Kansas & Texas Railway Company, near Muskogee, Oklahoma, on May 15, 1908.

The trains involved in this collision were a fast passenger train, commonly known as the "Katy Flyer", an interstate train being run at the time from St. Louis, Missouri, to points in the State of Texas, and a freight train, also an interstate train, and being run at the time from Muskogee, Oklahoma, to Parsons, Kansas.

The deceased was the railway baggageman and express messenger upon this passenger train and it is conceded by counsel for defendant in their brief that at the time of his death he was engaged in handling

both interstate and intrastate traffic and it was likewise conclusively shown at the trial and conceded at the trial that the deceased was at the time of his death engaged in handling both interstate and intrastate baggage as baggageman for the Railway Company upon the interstate passenger train which was involved in this collision.

The record does not show that any personal representative of the estate of the deceased has ever been appointed, and counsel for defendant in error state that none has been appointed.

The suit was brought by the widow in her own name and for the benefit of herself and four minor children, and the Railway Company took the position at the trial of the case and has maintained that position throughout this entire controversy that this is an action under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. at L. 66, and that it cannot properly be brought or maintained by any one but a personal representative of the deceased under the terms of that statute.

The facts bringing the case squarely within the Federal Act were pleaded by both the defendant in error and the Railway Company and the evidence at the trial was such that the right of recovery, if any existed, was controlled entirely by the Federal Employers' Liability Act.

Counsel for defendant in error in their brief discuss both the pleadings and the evidence in an effort to show that this Federal Act does not apply and such discussion will be fully answered under appropriate subheads in this brief.

Judgment was rendered in the trial court in favor of the widow in her personal capacity for \$100,000, to-

gether with interest and costs, and this judgment was affirmed by the Supreme Court of the State. Thereafter a petition for rehearing was filed and a rehearing was granted by the Court and the judgment was again affirmed and an entirely new opinion upon rehearing was written.

There were divers errors committed by the trial court, none of which were corrected by the State Supreme Court, which errors are proper for this Court to review upon writ of error to the State Court, all of which will be herein specifically pointed out.

This is clearly a case of which this Court has jurisdiction and the judgment of the State Court should be reversed and these motions to dismiss or affirm are clearly without merit and should be overruled.

Growing out of this same accident there was another suit instituted in the State Courts of the State of Oklahoma, namely, **Etta Lenahan v. M., K. & T. Railway Company**. The plaintiff was the wife of James Lenahan, who was the engineer upon the freight train involved in this collision. No personal representative was appointed for the estate of the deceased prior to the institution of suit and until after it had reached the Supreme Court of the State, and the suit was instituted by the widow in her individual capacity as in the suit at bar, and recovery was sought under the wrongful death statutes of this State.

The defendant Railway Company therein filed answer substantially the same as the answer in the case at bar and substantially the same evidence was introduced as to the interstate character of the trains and employment of the deceased. A verdict in this **Lena-**
han case was returned for \$15,000 and the Railway Company thereupon appealed to the State Supreme

Court, which court recently reversed the judgment and remanded the case for a new trial. The State Supreme Court in this **Lenahan case** fully recognized the supremacy of the Federal statute and followed the opinions of this Court, holding that the action must be brought and maintained by a personal representative and that there could be no recovery in favor of any other plaintiff.

As the pleadings, evidence and proceedings in this **Lenahan case** and in the case at bar are strikingly similar it cannot be understood how any distinction can be drawn between them. If one of them is controlled by the Federal statute they both necessarily must be. The opinion of the State Supreme Court in this **Lenahan case** has not yet been officially reported, but will be found in Volume 135, Pacific Reporter, at page 383.

ARGUMENT.

THE DEFENDANT IN ERROR IS NOT THE PROPER PARTY TO MAINTAIN THIS SUIT.

This action was brought and maintained by the widow of the deceased in her individual capacity for the benefit of herself and her minor children. This is in violation of the provisions of the Federal Employers' Liability Act (c. 149, 35 Stat., at L. 66), which provides that the liability is to the personal representative of the deceased. The widow in her individual capacity cannot properly maintain the action and no judgment can properly be rendered in her favor. This question has been foreclosed in this Court by several recent opinions and it is not deemed necessary to say anything further upon this point. The cases are as follows:

American Railway Company of Porto Rico v.

Birch, 224 U. S. 547, 56 L. Ed. 879;

Missouri, K. & T. Ry. Co. v. Wulf, 226 U. S. 570;

Troxell v. Delaware, L. & W. R. R. Co., 227 U. S.
434;

St. Louis, S. F. & T. R. Co. v. Seale et al., 229
U. S. 156.

II.

NUMEROUS ERRORS, PROPER TO BE REVIEWED BY THIS COURT UPON WRIT OF ERROR, WERE COMMITTED BY THE STATE COURTS AND THE RECORD IS PROPERLY PRESERVED FOR REVIEW.

Counsel for defendant in error, discussing the record in this case in connection with these motions, have referred to several opinions of this Court as to its jurisdiction to review the errors of State Courts upon writs of error from the Supreme Court of the United States to such courts.

Most of the cases referred to are not applicable to this controversy, but such as applicable show that this Court has jurisdiction of this cause.

The opinions referred to by counsel for defendant in error present cases where the facts have been found in the State Courts under such circumstances that this Court will not review such findings upon writs of error and also cases where judgments of the State Court are based upon grounds sufficiently broad in themselves to sustain such judgments without reference to the Federal questions involved. The conditions presented in the cases referred to by counsel for defendant in error do not exist in this case.

These different opinions cited by counsel for defendant in error will be again referred to in this brief and will be analyzed to show that in so far as they do not afford full support for the contention of counsel for plaintiffs in error that they are inapplicable to the facts as presented in the record in the case at bar. It is deemed best to defer this analysis until this Court becomes more familiar with the facts shown in this

record. With a knowledge of these facts the cases can be readily distinguished.

Federal questions are inherent in this case and are necessarily involved in any decision which can be rendered. The pleadings on the part of both the defendant in error and the Railway Company brought the case squarely within the Federal Employers' Liability Act. Both defendant in error and the Railway Company alleged that the deceased was an employe of the Railway Company and that as such he was engaged in commerce between the several states and that the deceased received the injuries resulting in his death while he was employed by the Railway Company in such commerce and these different allegations were fully supported by the evidence offered at the trial. Under these undisputed facts the liability, if any, of the Railway Company must be determined by Federal Laws and not by State Laws.

This Court will examine the entire record, including the evidence, to determine whether what purports to be a finding upon questions of fact by the highest State Court is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, and, if so, whether such questions of law, being Federal in character, were properly decided. The most recent case upon this proposition to which the attention of counsel has been called is **St. Louis, I. M. & S. Ry. Co. v. McWhirter**, 229 U. S. 265, wherein the Court says:

“We must first dispose of a motion to dismiss which was made and postponed to the hearing on the merits. It rests upon the ground that the case as made by the pleadings presented two distinct causes of action—one at common law, irrespective

of the statutes of the United States, and the other under those statutes; and that the former cause of action was sustained and affords a basis broad enough to support the judgment irrespective of what may have been decided concerning the statutes of the United States. The contention wants foundation in fact. As we have seen, the pleadings in express terms exclusively based the right to relief upon the statutes of the United States, and no non-Federal ground was either presented below or passed upon. It is true that although the case was exclusively rested upon Federal statutes, as it comes here from a State court, our power to review is controlled by Rev. Stat., Sec. 709, U. S. Comp. Stat. 1901, p. 575, and we may therefore not consider merely incidental questions not Federal in character; that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings were exclusively confined, or the converse, that is to say, the right of the defendant to be shielded from responsibility under that statute, because, when properly applied, no liability on his part from the statute would result. And, of course, **as the cause of action alleged was exclusively placed on the Federal statute, and the defense therefore alone involved determining whether there was liability under the statute, the mere statement of the case involved the Federal right and necessarily required, from a general point of view, its determination.** *Swafford v. Templeton*, 185 U. S. 487, 46 L. Ed. 1005, 22 Sup. Ct. Rep. 783.' (Bold-face type ours.)

This rule has been repeatedly announced by this Court and controls the case at bar.

In the recent case of **Southern Pacific R. Co. v. Schuyler**, 227 U. S. 601, the Court says:

“It is insisted (*a*) that there is no presumption that the railroad company violated the prohibition of the Hepburn Act by granting to Schuyler a free interstate ride, and that there is no evidence in the record to support such conclusion; and while it is conceded that ordinarily, upon writ of error to a State court, this Court does not review the findings of fact, yet it is insisted that in this case a Federal right has been denied as the result of a finding of fact which is without support in the evidence; that the evidence is before us in the record by which that insistence may be tested; and that the status of Schuyler, as an interstate passenger, is a mixed question of law and fact, so that it is incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this Court in such a case is well founded.”

In this **Schuyler** case, the Court refers approvingly to the previous opinion of this Court in **Kansas City S. R. Co. v. C. H. Albers Commission Co.**, 223 U. S. 573, 56 L. Ed. 556.

In this **Albers** case is the following:

“While it is true that upon a writ of error to a State court we cannot review its decision upon pure questions of fact but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision upon the latter.”

In this **Albers** case this Court referred to a number of cases where they have examined the entire evidence as disclosed in the record and have not relied upon what the opinion of the State Court disclosed or found.

In **Creswill v. Grand Lodge K. of P. of Georgia**, 225 U. S. 246, 56 L. Ed. 1074, the Court says:

“While it is true that upon a writ of error to a State court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question, to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right.”

In **Washington ex rel. Oregon R. & N. Co. v. Fairchild**, 224 U. S. 510, 56 L. Ed. 863, the Court said:

“If, then, the defendant had notice and was given the right to show that the order asked for, if granted, would be unreasonable, it has not in this case been deprived of the right to a hearing. That being so, it leaves for consideration the contention that, as a matter of law, the order, on the facts proved, was so unreasonable as to amount to a taking of property without due process of law. This necessitates an examination of the evidence, not for the purpose of passing on conflicts in the testimony, or of deciding upon pure questions of

fact, but, as said in **Kansas City Southern R. Co. v. C. H. Albers Commission Co.**, 223 U. S. 591, *ante*, 565, 32 Sup. Ct. Rep. 320, from an inspection of the entire record including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."

In **Cedar Rapids Gas Light Co. v. City of Cedar Rapids**, 223 U. S. 655, 56 L. Ed. 594, the Court says:

"But, of course, findings, either at law or in equity, may depend upon questions that are re-examinable here. The admissibility of evidence or its sufficiency to warrant the conclusion reached may be denied; or the conclusion may be a composite of fact and law, such as ownership or contract; or in some way the record may disclose that the finding necessarily involved a ruling within the appellate jurisdiction of this Court. Such questions, properly saved, must be answered, and, so far as it is necessary to examine the evidence in order to answer them or to prevent an evasion of real issues, the evidence will be examined."

In **Graham v. Gill**, 223 U. S. 643, 56 L. Ed. 586, the Court says:

"It is insisted that the writ of error should be dismissed because no Federal question is involved. The contention, however, is without merit, since repeatedly during the trial the plaintiffs objected to the admission of all evidence bearing upon the location of the tract in controversy other than the field notes of the survey under which the plaintiffs claimed which it was contended were the best and only evidence. In passing adversely on these ob-

jections the trial court did not merely determine the weight or sufficiency of the evidence to prove a fact, but passed on the competency and legal effect of the evidence as bearing upon a question of Federal law, viz, the effect of the requirements of Section 2396, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1473), as to the mode of surveying public lands. Thus a Federal question was presented and decided."

In **St. Louis, I. M. & S. R. Co. v. Taylor**, 210 U. S. 281, 52 L. Ed. 1061, the Court says:

"Where a party to litigation in a State court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the State Court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the Act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union."

It is submitted that under the doctrine of the cases above referred to this Court will review this record and, if necessary, examine the evidence and correct the errors of the State courts.

A writ of error to the State court will not be dis-

missed for want of jurisdiction where the Federal questions are clearly raised, even if the claims by which they were presented are not well founded.

It is only necessary that Federal questions be not wholly without foundation to bring the questions here for review on their merits, for otherwise a judgment for dismissal would be judgment upon the Federal questions without consideration of the merits of the claim or its existence and its wrongful decision by the State courts. It is sufficient if there was color for the claim.

Blythe v. Hinckley, 180 U. S. 333, 45 L. Ed. 557;
**New Orleans v. New Orleans Waterworks Com-
pany**, 143 U. S. 79, 35 L. Ed. 943.

In *Blythe v. Hinckley*, *supra*, the Court said (page 337):

“The motion to dismiss the writ of error in this case, for lack of jurisdiction, must be denied.

“The objections raised by the complaint to the validity of the judgments mentioned therein were that they were void for want of jurisdiction in the courts which rendered them over the questions decided, because of the provisions of the Federal Constitution above recited. Although the claim may not be well founded, the question, nevertheless, was duly raised, and its Federal character cannot be disputed. This necessitates the denial of the motion to dismiss.”

In *New Orleans v. New Orleans Waterworks Com-
pany*, *supra*, the Court said (page 87):

“It (referring to the Federal question) must not be wholly without foundation. There must be at least color of ground for such averments, otherwise the Federal question may be set up in almost

any case and the jurisdiction of this Court invoked simply for the purpose of delay."

Where the question of jurisdiction cannot be determined without looking into the merits, a motion to dismiss will be denied with permission to argue it on hearing.

Hecker v. Fowler, 1 Black. 95, 17 L. Ed. 45;

Semple v. Hager, 4 Wall. 431, 18 L. Ed. 402;

Lynch v. DeBernal, 131 U. S. (Appendix XCIV), 19 L. Ed. 395.

In *Hecker v. Fowler*, *supra*, the Court said:

"We are asked to dismiss this writ because no error appears on the face of the record. It is not necessary, by the practice of this Court, for the party who brings a cause here to specify upon the record the errors he complains of, and they are not even informally brought to our notice until the argument is heard. Want of jurisdiction and irregularity of the writ are the only grounds for dismissal. Where a judgment appears to have been rendered which the party is entitled to have revised in this court, and it is also seen that it comes here for such revision upon proper process, duly issued, all other questions must await the final hearing. To say that there is no error in this judgment, and affirm it for that reason, would be to decide the whole legal merits of the case, and this we cannot do on a motion to dismiss or quash the writ."

In *Semple v. Hager*, *supra*, the Court said:

"In all cases of a motion to dismiss the writ of error for want of jurisdiction, the Court must necessarily examine the record to find the questions decided by the State court. But in many

cases the question of jurisdiction is so involved with the other questions decided in the case, that this Court cannot eliminate it without the examination of a voluminous record, and passing on the whole merits of the case. In such instances, the Court will reserve the question of jurisdiction till the case is heard on the final argument on the merits."

In *Lynch v. DeBernal*, *supra*, the Court said:

"The question of jurisdiction in this case cannot be determined without opening the record and looking into the merits of the controversy.

"The motion to dismiss for want of jurisdiction will, therefore, be denied, but may be argued upon the hearing of the cause."

It is idle for counsel for defendant in error to contend for a moment that the Federal questions are not properly preserved in this record, for review by this Court. An examination of both the original opinion and the opinion upon rehearing will show that the State Supreme Court held that the questions were sufficiently raised and decided them adversely to the plaintiffs in error. In *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 703, a case arising under this Federal Act, this same contention was made. The Court said:

"At the trial the defendant asked for a ruling that the plaintiff could not recover damages for pain under the second count, which was denied, subject to exception. The Supreme Court treated the request as intended to raise the question whether the Employers' Liability Act of Congress of April 22, 1908, Chap. 149, 35 Stat. at L. 65, U. S. Compt. Stat. Supp. 1911, page 1322, displaced the

State law, as undoubtedly it was; stated that the suit was not based upon that act, and held that the act of Congress was only supplementary, and that the judgment could be upheld under the State law 98 Ark. 240, 135 S. W. 874.”

A few extracts from these opinions in the case at bar will show that the State Supreme Court held these questions sufficiently raised and decided. In the original opinion of Mr. Justice Williams it is said:

“The plaintiff in error insists that the liability of the plaintiff in this case is controlled entirely by the Act of Congress commonly known as the ‘Employers’ Liability Act.’ under which the only person entitled to sue is the personal representative of the deceased” (Appendix, p. 250).

* * * * *

“It is insisted that the intestate was not in the employ of the plaintiff in error, but in that of the American Express Company. Under the issues as framed, said intestate was an employe of the express company and not of the railroad company. This is not an action by the defendant in error against the American Express Company, the intestate’s employer, in which event, if the express company comes within the term of a common carrier by railroad, the Act of Congress of April 22, 1902, would apply” (Appendix, p. 252).

* * * * *

“As to the specification of error predicated upon the Court’s instructing the jury that three-fourths of their number could return a verdict, this contention is without merit. Section 19, Article 2 (Bill of Rights), Constitution; running Section 27 (Williams’ Ed.) and citations; St. Louis & S. F. R. Co. v. Rushing *et al.*, 120 Pac. 973” (Appendix, p. 272).

A petition for rehearing was filed after this opinion was handed down and upon the filing of that petition for rehearing (Appendix, p. 196), an order was made by the Court staying the mandate (Appendix, p. 234). A rehearing was granted and the case was thereafter orally argued and an entirely new and different opinion was written upon rehearing (Appendix, p. 272).

The Federal questions were presented at the very inception of the case and throughout its entire progress, but even if the Federal questions had not been presented previous to the filing of this petition for rehearing under the opinion of this Court these questions could first be presented in this petition for rehearing.

In **Mallett v. North Carolina**, 218 U. S. 589, 45 L. Ed. 1015, the Court says:

“It is true, as we learn from the first opinion filed by the Supreme Court, that such Federal questions were not considered by that court, or at all events, were not treated as Federal questions, but as questions arising under state laws. But the record discloses that, after that opinion had been filed, but before it had been certified down, the defendants filed a petition for reargument, and presented the Federal questions on which they rely. The Supreme Court entertained the petition and proceeded to discuss and decide the Federal questions. In support of the motion to dismiss, numerous decisions of this court are cited to the effect that it is too late to raise a Federal question by a petition for a rehearing in the Supreme Court of a state after that court has pronounced its final decision.

“But those were cases in which the Supreme Court of the state refused the petition for a re-

hearing and dismissed the petition without passing upon the Federal questions. In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record."

A few extracts from the petition for rehearing will be pertinent to show that the questions were fully presented to the State Supreme Court and are as follows:

"That this cause was tried on the theory that the issue was made by the pleadings that the deceased, William B. West, was an employe of the plaintiff in error, Railway Company, and that the evidence at the trial showed that he was such an employe, and under decisions controlling upon this court, to which the attention of this court was not called, either in brief or in oral argument, this case must be decided by this court upon that theory" (Appendix, p. 197).

* * * * *

"The Supreme Court of the United States has definitely decided that this action must be brought by the personal representative, and not by the beneficiary, which decision is controlling upon this court, and was not called to the attention of this court either in the brief or oral argument, for the reason that the decision was rendered on the 13th day of May, 1912, subsequent to the time that the briefs were filed in this cause, and only a few days before the oral argument herein, which was on the 20th day of May, 1912, and at the time of that oral argument, counsel for plaintiff in error had not been apprised of this decision, which is **American Railway Company against Birch**, reported in Supreme Court Reporter (West publication), volume

32, at page 603 (224 U. S. 547).” (Appendix, p. 199.)

* * * * *

“Under the Act of Congress which applies to this case, it was error to instruct the jury that three-fourths of their number may return a verdict” (Appendix, p. 223).

The language of the above quotations from the petition for a rehearing is framed in accordance with Rule IX of the State Supreme Court, which provides as follows:

“Such petition shall briefly state the grounds upon which counsel relies for a rehearing, and show either that some question decisive of the case and duly submitted by the counsel has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision, to which the attention of the court was not called, either in brief or oral argument, or which has been overlooked by the Court, and the question, statute or decision so overlooked must be distinctly and particularly set forth in the petition.”

While this **Birch case** was not called to the attention of that court in the briefs filed before the petition for rehearing was filed, and in the oral argument before that Court, for the reason stated in the extract from the petition for rehearing above set out, the point that the widow could not maintain this suit in her individual capacity, but that it must be maintained, if at all, under the Federal Employers' Liability Act, was fully and clearly presented to the Court and a large number of cases from this court and from the different states were cited to the Court, together with several text-

books dealing with this subject. These cases which were cited in the original brief and in the oral argument and which are in full accord with the principles laid down in the **Birch case** are as follows:

- Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. Ed. 772;
- McNeill v. Southern Ry. Co., 202 U. S. 543, 50 L. Ed. 1142;
- Gulf C. & S. F. Ry. Co. v. Hefley & Lewis, 158 U. S. 98, 39 L. Ed. 910;
- St. Louis & S. F. R. R. v. State, 26 Oklahoma 62, 107 Pac. 929;
- El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. Ed. 106;
- Dewberry v. Sou. Ry. Co., 175 Fed. 317;
- Fulgham v. Midland Valley R. Co., 167 Fed. 661;
- Missouri, K. & T. Ry. Co. of Texas v. Poole (Texas 1909), 123 S. W. 1176.

The above cited cases deal more particularly with the question that the right of action is derived from and controlled entirely by the Federal statute. On the direct question that the widow could not maintain this suit under the Federal statute in her individual capacity the original brief of the plaintiff in error Railway Company contains, among other things, the following:

“It is a well-established principle of law that where a cause of action is given by a statute, the person designated in the statute to sue is the only person who can properly maintain the suit.

“In *Tiffany on Death by Wrongful Act*, paragraph 116, it is said: ‘The action is maintainable only by the person who is, by the terms of the statute, authorized to maintain it. If that person

is the executor or administrator, the action cannot be brought by the beneficiaries.'

"In *Black on Law and Practice in Accident Cases*, paragraph 125, it is said:

" 'Thus, if the statute, as in Lord Campbell's Act, provides that the "action shall be brought by and in the name of the executor or administrator of the person deceased," the executor and administrator is the proper and only party plaintiff.'

"In *Ray on Negligence of Imposed Duties (Passenger Carriers)*, paragraph 177, it is said:

" 'As the remedy exists and is created only by statute, it follows that it can only be pursued in the mode and under the conditions specified therein. If the statute provides that the action shall be brought by the executor or administrator of the deceased, no other person can maintain an action.'

"The text-writers are fully borne out by numerous authorities.

"In *Harshman v. Northern P. Ry. Co.* (North Dakota 1905), 103 N. W. 413, it is said:

" 'The only remaining person, then, who could maintain this action, under the statute, is the personal representative. Statutes similar to this are in effect in almost all of the states, and it is universally held that only the persons designated in the statute can maintain the action. The reason is self-evident, namely, that the right or cause of action is statutory, and is given to only those whom the statute designates. * * * It is contended by the plaintiff, however, that inasmuch as he is the sole heir, and as such is entitled to any sum which may be lawfully recovered, the verdict which has been returned in his favor, even though he has no right under the statute to maintain the action, should be sustained. We cannot agree to this contention. Aside from the absence of any

legal right to the verdict, we are not permitted to assume that a verdict returned in a different action prosecuted under authority of law would be the same as that which has been returned without legal sanction or right.'

"In *Nash v. Tousley*, 28 Minn. 5, 8 N. W. 875, it is said:

" 'The right of action thus given was wholly unknown to our law before the passage of these provisions of statute. It is, therefore, altogether a creature of the statute, and must be enforced (if at all) as the statute enacts, and not otherwise. The action to enforce it must, therefore, be brought by the "personal representatives of the deceased"; that is to say, by his executor or administrator.'

"In *Wilson v. Bumstead*, 12 Nebraska 3, 10 N. W. 411, 412, it is said:

" 'As no action would lie at common law, the remedy is entirely statutory, and the conditions upon which the right to maintain the action rests must be complied with. The second section provides that "every such action should be brought by and in the name of the personal representatives of such deceased person." They are the only persons authorized to bring the action.'

"In *St. Louis, I. M. & S. Ry. Co. v. Needham* (Circuit Court of Appeals, Eighth Circuit, 1892), 52 Federal 371, 373, it is said:

" 'Since the right of action and the remedy for the wrongful killing exists only by virtue of the statute, they exist for the benefit of the persons there specified, and of such persons only; and where, as in this case, such a statute expressly specifies the parties who may bring the action, those parties, and those parties only, can maintain it.'

"In *Louisville & N. R. Co. v. Jones* (Florida 1903), 34 Southern, 246, 248, it is said:

“ ‘The error in giving it necessitates a reversal because the subject of the charge vitally affected the substance of the right of action itself in the plaintiff who sued. At the common law no one had any right to recover for the negligent or wrongful death of another, and the right of recovery in such cases is due entirely to the statute giving such right, and it exists only in such persons as the statute gives it to.’

“ ‘In *City of Eureka v. Merrifield et ux.* (Kansas 1894), 37 Pacific 113, 114, it is said:

“ ‘An action for injury resulting in death is maintainable only by the person who is, by the terms of the statute, authorized to maintain it.’

“ ‘In *Walker v. O’Connell* (Kansas, 1898), 52 Pacific 894, 895, it is said:

“ ‘The claim made by the defendant in support of these various motions and objections, and the request to instruct, was that a right of action for damages for death is statutory, and cannot be maintained except under the statutory conditions; that in such case a widow’s right to sue is conditioned upon the non-appointment of an administrator of the decedent’s estate; therefore, the petition, which in this instance lacked the averment of non-appointment, failed to bring the case within the statutory terms. This claim was well taken and should have been sustained.’

“ ‘In *Atchison Water Co. v. Price et ux.* (Court of Appeals, Kansas, 1900), 59 Pacific 677, it is said:

“ ‘The plaintiffs failed to bring themselves within the conditions prescribed by the statute, and having no right to maintain the action at common law, or aside from the statute, they failed to show a right of recovery; so the Court erred in overruling the demurrer to the plaintiffs’ evi-

dence, and erred also in denying the defendant's motion for a new trial upon this ground.'

"In *Vaughn v. Kansas City N. W. R. Co.* (Kansas 1902), 70 Pacific 602, 603, it is said:

" 'Therefore, when it is said in *City of Eureka v. Merrifield*, 54 Kan. 794, 37 Pac. 113, that "The action is maintainable only by the person who is, by the terms of the statute, authorized to maintain it," no more is stated than that the action is maintainable only by the precise person who is, by the terms of the statute, permitted to do so.'

"In *Major v. Burlington, C. R. & N. Ry. Co.* (Iowa 1902), 88 N. W. 815, 816, it is said:

" 'Indeed, it seems to be the general rule that whenever a right is created by legislation and at the same time a remedy is prescribed, such remedy is part of the right and exclusive.'

"In *Cleveland, C. C. & St. L. Ry. Co. v. Osgood* (Appellate Court of Indiana, 1905), 73 N. E. 285, 286, it is said:

" 'The right to maintain the action is vested in the personal representatives of the deceased. Had the provisions gone no further, the fund recovered would have been simply assets of the estate, to be disposed of as other assets. The legislature, having the right to determine what disposition should be made of the fund, charged it with the express trust that it must inure to the benefit of the widow and children, if any, first, and, if no widow or children, then to the next of kin. The action is brought by the administrator in his representative capacity. The widow, children and next of kin are not parties, have no right to be parties, and have no right to compromise or control the action.' "

In the opinion on rehearing written by Mr. Justice Kane, it is shown that the Federal questions were properly presented and decided by the state court, as

will appear from the following extracts from this opinion on rehearing:

“The first assignment is based upon the theory that the pleadings and evidence show that the deceased suffered the injury which resulted in his death while he was employed by the railway company in commerce between the states within the meaning of the Act of Congress relative to the liability of common carriers by railroad to their employes in certain cases, and therefore the cause of action accrued to the personal representative of the deceased for the benefit of the surviving widow and children. This contention cannot be sustained” (Appendix, p. 280).

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“The language of the Act of Congress carries with it the idea and the essence of a contract. To be employed by one is to be engaged in his service, to be used as an agent or substitute in transacting his business to be commissioned and entrusted with the management of his affairs. In our judgment, the words, ‘while employed by such carrier,’ construed in connection with the context, is equivalent to ‘while hired by such carrier,’ which implies a request and a contract for compensation. The persons falling within the meaning of the Act are those hired by the railway company, or those who are working for it at its request and under an agreement on its part to compensate them for their services” (Appendix, p. 282).

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“On rehearing it is contended that the evidence adduced at the trial disclosed that the injury was suffered while the deceased was employed by the railway company and that, even if no issue of fact on the question of employment was joined by the

pleadings, the case as to parties must be governed by the Employers' Liability Act. It is familiar law that if, during the course of the trial, it develops that the real case is not controlled by the state statute, but by the Federal statute, and the case is commenced under the former, the case pleaded is not proved and the case proved is not pleaded. **St. Louis & S. F. Ry. Co. v. Seale**, 229 U. S. 156" (Appendix, p. 283).

* * * * * * *

"We, therefore, find with the court below that the pleadings and the evidence conclusively show that the deceased suffered the injuries that resulted in his death while he was employed by the express company, and not while he was employed by the railway company, in interstate commerce within the meaning of the Federal Employers' Liability Act" (Appendix, p. 285).

From the very inception of this case by the filing of the petition, and all during the trial, the Federal questions were called to the attention of the trial court at the proper time and in the proper manner.

First in order, a demurrer to the petition was filed on the ground that it did not state facts sufficient to state a cause of action. This was amply sufficient to present the Federal question under the doctrine announced in the **Seale case**, *supra*, if there is any merit in the present contention of counsel for defendant in error that the petition was not drawn under the Federal statute.

During the introduction of the testimony, evidence was offered touching the interstate character of the trains involved in the collision and the interstate character of the work performed by the deceased for the railway company.

At the close of the evidence, a motion was made by counsel for the railway company for the Court to instruct a verdict in its favor. This request for an instructed verdict (Appendix, p. 184) is in itself sufficient under the decisions of this court to present the Federal question. This point was decided in **St. Louis, I. M. & S. Ry. Co. v. McWhirter**, *supra*, and also in the case of **St. Louis, S. F. & T. Ry. Co. v. Seale**, *supra*.

In the **McWhirter case** the Court said:

“At the close of all the evidence the defendant requested the Court to instruct the jury to find in its favor. The Court refused to do so and an exception was noted.

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“This is true since the finding that there was some evidence to go to the jury on the subject of negligence independently considered was necessarily a ruling against the binding instruction asked at the close of the testimony, upon the assumption that there was nothing adequate to go to the jury to show liability under the Federal law. While it is true, as we have said, that, coming from a state court, the power to review is controlled by Rev. Stat., Sec. 709, yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law.”

In the **Seale case** the Court said:

“When the evidence was adduced, it developed that the real case was not controlled by the state statute, but by the Federal statute. In short, the case pleaded was not proved, and the case proved

was not pleaded. In that situation, the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time, and that the state courts erred in overruling it."

In addition to this request for a directed verdict to which the railway company was clearly entitled under the pleadings, under the evidence and by reason of the holding of this court that the widow, in her individual capacity, cannot maintain her suit, counsel for the railway company also requested the Court to give several instructions which specifically call to the attention of the Court the contention of the railway company under the Federal statute that the widow of the deceased, in her individual capacity, was not entitled to recover. These different requested instructions were refused by the Court and proper exceptions saved (Appendix, p. 72). Requested instruction No. 3 is as follows:

"If you find from the evidence in this cause that the said W. B. West **was employed by the defendant as baggage-master** and was acting as such at the time of his death, **you will find the issues in favor of the defendant**" (Appendix, p. 184).

Requested instruction No. 4 is as follows:

"If you find from the evidence in this cause that the deceased, W. B. West, **was an employe of the defendant** at the time he received the injuries which caused his death, and that **as such employe he was engaged in interstate commerce**, as hereafter explained, **then the laws of the United States would govern** the liability of the defendant herein" (Appendix, p. 184).

Requested instruction No. 6 is as follows:

“If you find from the evidence that the train upon which West was working was at the time of his death **engaged in commerce between the states and that he was an employe of the defendant**, the plaintiff is not entitled to recover” (Appendix, p. 185).

The charge of the Court on the question of the measure of damages allows a recovery for loss of society and mental anguish (Sixth paragraph of Charge, Appendix, p. 190). These are not proper items of damage under the Federal statute, as will be more fully shown when this particular matter is further discussed in this brief, and counsel for the railway company requested the Court to give an instruction eliminating these items of damage from the amount to be recovered, if any. This requested instruction of the railway company is numbered 7 and is as follows:

“If you should find for the plaintiff, your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained, and you are not to permit your sympathy to influence your verdict. **The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish.** Your verdict must be based upon the financial loss in dollars and cents” (Appendix, p. 185).

The trial court, in accordance with the laws of this state, instructed the jury that nine of the jury agreeing was sufficient to return a verdict for the defendant in error (Appendix, p. 190). As this case is controlled entirely by the Constitution and laws of the United States, this instruction was error, and counsel

for the railway company duly excepted to the giving of the instruction. The error in giving this instruction will be hereafter fully presented, but the attention of the Court is here directed to these different proceedings for the purpose of showing that the Federal questions were properly preserved for review.

The plaintiff in error, railway company, in due time filed its motion for a new trial, in which all of the several errors hereinabove referred to were again called to the attention of the trial court, and furthermore in this motion for a new trial it was alleged, as further grounds of error, that the verdict is excessive and was given under the influence of prejudice and passion. The motion for a new trial appears in the appendix at page 191).

All of these different errors of the trial court, any one of which would entitle the plaintiffs in error to a review by this court, were called to the attention of the State Supreme Court in the assignments of error filed in that court when the case was appealed to that court.

Counsel for defendant in error have cited in support of their motion to dismiss numerous opinions of this court. As has heretofore been stated in this brief, in so far as these opinions have any bearing upon the facts presented in the case at bar, they are in support of the contention of counsel for plaintiffs in error that there is no merit in this motion. These cases cited by counsel for defendant in error are as follows:

Thayer v. Spratt, 189 U. S. 346, 347;

Telluride Power Trans. Co. v. Rio Grande Ry. Co., 175 U. S. 639, 647;

Crary v. Devlin, 154 U. S. 619;

Wood v. Chesborough, 228 U. S. 672, 676;

- Waters-Pierce Oil Co. v. State of Texas**, 212 U. S. 86, 97;
Chrisman v. Miller, 197 U. S. 313, 319;
Vandalia Ry. Co. v. South Bend, 207 U. S. 359, 367;
Kerfoot v. Farmers & M. Bank, 218 U. S. 281, 288;
Mammoth Mining Co. v. Grand Central Mining Co., 213 U. S. 72, 77;
Delmar Jockey Club v. Missouri, 210 U. S. 324, 335;
Clipper Mining Co. v. Eli Mining Co., 194 U. S. 220, 222;
Hedrick v. Atch. T. & S. F. Ry. Co., 167 U. S. 673, 677;
Egan v. Hart, 165 U. S. 188, 189;
Dower v. Richards, 151 U. S. 658, 663;
Vandalia Ry. Co. v. South Bend, 207 U. S. 359, 368;
Missouri Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556, 576;
Sea Board Air Line Ry. Co. v. Duvall, 225 U. S. 477, 487;
Johnson v. Risk, 137 U. S. 300, 307;
DeSaussure v. Gaillard, 127 U. S. 216;
New Orleans v. New Orleans Water Works, 142 U. S. 79, 84;
O'Neil v. Vermont, 144 U. S. 323, 336;
Northern Pac. Ry. Co. v. Ellis, 144 U. S. 458;
Davidson v. Connelly, 154 U. S. 589;
Eustis v. Bolles, 150 U. S. 361;
Cook Co. v. Calumet, Etc., Co., 138 U. S. 635;
Sayward v. Denny, 158 U. S. 180, 183, 184;
Connecticut v. Woodruff, 153 U. S. 689;
Sherman v. Grinnell, 144 U. S. 198.

In **Thayer v. Spratt**, *supra*, there was a question as to whether certain entries upon public lands were

valid, which question was dependent upon whether or not the lands were timber lands. This court held that it would not disturb the finding of the state court as to the character of the lands. This case presented a pure question of fact arising under disputed evidence, and this court, in accordance with numerous other decisions, held that it would not review these questions of fact upon writ of error.

In the case at bar, the facts showing the deceased to be an employe of the railway company are undisputed and the rights of the railway company under the Federal statute are inherent in the case, and the State Supreme Court expressly denied the plaintiffs in error these rights.

In **Telluride Power Trans. Co. v. Rio Grande Ry. Co.**, *supra*, the title to a tract of land was involved. This court held that the Federal questions were not properly saved for review in this court, and also held that the question of priority of possession to the land was not a Federal question, but a question of fact upon which the decision of the state court was conclusive, and that the state court, in rendering its decision, placed no construction upon certain Federal statutes which it was claimed were involved in the case, and that no Federal rights were denied the complaining parties.

Crary v. Devlin, *supra*; **Connecticut v. Woodruff**, *supra*, and **Davidson v. Connelly**, *supra*, are memorandum opinions of this court, and it is impossible to tell from these opinions what the record in the respective cases disclosed, and it cannot, therefore, be told whether they have any application to the case at bar.

In **Wood v. Chesborough**, *supra*, there was involved the title to certain lands in the State of Mississippi,

the plaintiffs claiming to derive title through patent to the state under a swamp land Act of Congress. The defendants denied the validity of these Acts and also interposed as a defense a statute of limitations of the state and laches on the part of the plaintiffs. The state court decided the case upon the non-Federal grounds and this court held that such grounds were sufficiently broad to sustain the judgment. This is in accord with the unquestioned doctrine announced by this court, but is inapplicable to the case at bar because it was impossible for the state court in the case at bar to render the judgment which they did without deciding the Federal question and denying plaintiffs in error rights to which they are entitled thereunder.

The case of the **Waters-Pierce Oil Co. v. State of Texas**, *supra*, was decided by this court upon its merits. This case involved a suit for penalties on account of alleged violation of certain anti-trust statutes of the State of Texas by the defendant corporation. This court stated that it would not review the findings of fact made by the state court, but that it would review questions of Federal law within the jurisdiction conferred upon the court, and did so in that case.

In **Chrisman v. Miller**, *supra*, there was involved a controversy between two mineral claimants in which the question of sufficiency of the discovery was under consideration. The trial court found that the plaintiffs in error in the suit had never made any discovery of petroleum or other mineral oil and did not make the attempted location in good faith and never did any work on the tract of land. This court held that this was such a finding of fact as would not be reviewed.

The case of the **Vandalia R. Co. v. Indiana**, *supra*, is another case where it was held that the judgment of

the state court was based upon a sufficiently broad non-Federal ground to preclude review by this court. This was a suit to require the railroad company to open up its tracks and yards within a certain street and to establish crossings, and it was claimed on the part of the complainants that the railroad company was obligated to make the necessary improvements by virtue of a certain franchise granted by the city, which franchise the railroad company had accepted and acted under. The railroad company, on the other hand, contended that the performance of the work would constitute a taking of its property without due process of law, in violation of the Fourteenth Amendment. In this case, the court announced the doctrine which is applicable to the case at bar in the following words (p. 367):

“Doubtless this court is not concluded by the ruling of the state court and must determine for itself whether there is really involved any Federal question which will entitle it to review the judgment.”

The case of **Kerfoot v. Farmers & M. Bank**, *supra*, involved the validity of the conveyance of real estate to a national bank under the national banking laws of the United States, and this court held that it would not review the findings of fact of the state court concerning the acceptance of the deed.

In **Mammoth Mining Co. v. Grand Central Mining Co.**, *supra*, questions of fact alone were involved which had been decided by the state court upon conflicting evidence. This was a mining case to recover for the removal of ores from beneath the surface of a certain mining claim and for an injunction. The ground upon

which this court was asked to take jurisdiction was that the decision of the State Supreme Court upon the facts rested upon a definition of a lode or vein which the plaintiff in error therein contested, and that, therefore, the case turned upon the construction of the Revised Statutes, paragraph 2322, but the court held that under the facts as found neither the record nor the opinion presented a Federal question. It was held that there was no mistake of law in the case; while in the case at bar there was clearly a mistake both of law and of fact.

In **Delmar Jockey Club v. Missouri**, *supra*, it was held that the mere assertion by plaintiff in error that the judgment of the state court deprived the complaining party of his property by unequal enforcement of the law in violation of the Federal immunities especially set up does not create a Federal question where there is no ground for such a contention, and the state court followed its conception of the rules of pleading as expounded in its previous decisions. It was held that the Federal questions presented were so plainly devoid of merit as not to constitute a basis for a writ of error. It is not believed that any such contention can be made with reference to the case at bar.

The case of the **Clipper Mining Co. v. Eli Mining Co.**, *supra*, is like the other mining cases above referred to in that there were disputed questions of fact decided in the state courts, and therefore not reviewable in this court by writ of error. It is not deemed necessary to say more in connection with this case, as the principle of law therein announced is not disputed.

The case of **Hedrick v. Atch. T. & S. F. Ry. Co.**, *supra*, was an action of ejectment against the railway company to recover possession of a portion of the com-

pany's right-of-way. In this case the court would not disturb the findings of fact by the state courts and stated that the only inquiry which it could make was whether upon the facts so found the defendants in the court below were entitled to judgment therein rendered. This case is in nowise different in principle from the other cases along the same line, but is not applicable to the case at bar.

In **Egan v. Hart**, *supra*, it was held that the findings of the state courts that a stream across which a dam was erected was a non-navigable stream, was conclusive on this court and that the decision of the highest state court was based upon grounds sufficiently broad to sustain it without reference to any Federal questions which might be involved. As heretofore stated, this rule cannot apply to the case at bar.

The case of **Dower v. Richards**, *supra*, states succinctly the principle which applies to the case at bar as follows (p. 667):

“When indeed the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court.”

In **Missouri Pac. Ry. Co. v. Fitzgerald**, *supra*, it was held that the decision of the Supreme Court of Nebraska that the railway company could not maintain its claim for damages because its possession had not been disturbed nor its title questioned, involved no Federal question, and that where the decision of the state court thus rests upon independent grounds not involving Federal questions and broad enough to sus-

tain the judgment the writ of error will not be entertained by this court, and that the state court did not so pass upon the Federal question as to furnish grounds for review. In the case at bar, Federal questions were passed upon and decided adversely to the plaintiff in error.

The case of the **Seaboard Air Line Ry. Co. v. Duvall**, *supra*, was one arising under the Federal Employers' Liability Act, which is involved in the case at bar, but contrary to the facts in the case at bar, the Act of Congress was not erroneously construed, and, therefore, no rights were denied the railway company. The principle contended for in the case at bar is clearly stated in this Duvall case as follows (p. 486):

"This action was brought under an Act of Congress. If the Act has been erroneously construed and exceptions saved, or if a particular construction to which the party asking was entitled was denied, a right has been denied under the statute and the question may be reviewed by this court."

It is respectfully submitted that in the case at bar the fact that the railway company was being denied a right under a Federal Act was definitely brought to the attention of the trial court at every opportune time.

In **Johnson v. Risk**, *supra*, two grounds of defense were interposed, one purely local in character, namely, the statute of limitation, and the other involving a Federal question. The State Supreme Court sustained the defense of the statute of limitations and the decision of the Federal question was not necessary.

The same principle in the case last above referred to was also involved in **DeSaussure v. Gaillard**, *supra*. The action was based upon an Act of the General As-

sembly of the State of Carolina relative to the collection of taxes, but the decision of no Federal question was necessary to the determination of the case.

The case of **New Orleans v. New Orleans Water Work Co.**, *supra*, is in support of the contention of plaintiff in error and has heretofore been referred to in this brief, and it is not deemed necessary to say anything further concerning this case in this connection.

In **O'Neil v. Vermont**, *supra*, like other cases hereinabove referred to, the Supreme Court of Vermont decided the case on a ground broad enough to sustain the judgment without considering any Federal questions.

In **Northern Pacific Ry. Co. v. Ellis**, *supra*, suit was brought against the railway company to quiet title to certain city lots and the suit was instituted before the institution of an action in respect to other real estate in the Circuit Court of the United States, and the judgment of the Supreme Court of the State was held to be *res adjudicata* between the parties before the decree was entered in the Circuit Court. This court stated in the opinion that the judgment of the state court was rendered in accordance with well-settled principles of law not involving any Federal question and did not deny to the decree of the Circuit Court the effect which would be accorded under similar circumstances to judgments and decrees of the state court and, therefore, dismissed the writ of error, holding that this judgment of the state court was upon sufficiently broad grounds without regard to any Federal question.

The case of **Eustis v. Bolles**, *supra*, involved certain insolvency statutes of the State of Massachusetts. It was claimed that to give effect to these statutes would impair an obligation of contract within the meaning

of the Constitution of the United States, but this court held that the decision of the state court was based upon a local or state question and that it was unnecessary to decide the Federal question.

In **Cook Co. v. Calumet, Etc., Co.**, *supra*, certain swamp land acts of the General Assembly of the State of Illinois were under consideration. But this court held that these acts were in entire harmony with the acts of Congress and that the intention of the Legislature was, as the Supreme Court of Illinois held, to protect the title of purchasers from the United States after the passage of the Act of Congress of September 28, 1850, and that no Federal rights were denied.

In **Sayward v. Denny**, *supra*, it was held that this court would not review the ruling of the state court on principles of general law and that in that case there was nothing in the record to indicate that the state court was led to suppose that rights were claimed under the Constitution of the United States. It was a suit to recover moneys paid on a contract which had been executed by one of the parties as surety for another party. So far as can be determined from the opinion, there was no suggestion throughout the proceedings in the state court that any Federal rights were claimed.

In **Sherman v. Grinnell**, *supra*, one of the parties collected money from the Treasury of the United States as attorney for a former Collector of the Port of New York, but did not pay over the money to the executors of such Collector, and suit was brought to recover the money. The defense was that the case had been reopened by the Government and that he feared he would be compelled to repay it and that no valid agency could exist by force of the statute of the United States to collect and pay over this money. This court, in

passing upon the motion to dismiss, held that the state court did not pass upon the validity of any statute or authority exercised under the United States, nor decide any title, right, privilege or immunity specially set up or claimed by defendant, and that all that the state court decided was that he could not deny claimant's title to the money and that this was broad enough to sustain the judgment without deciding any Federal question if there was any in the case.

Relative to the contention of counsel for defendant in error that the Federal questions were not properly or seasonably raised in the state court, they have cited several cases. Some of them have just been reviewed, and it is not deemed necessary to say more concerning them. They have cited the following additional cases:

Chesapeake & Ohio Ry. Co. v. McDonald, 214 U. S. 191-193;

El Paso & S. W. Ry. Co. v. Eichel, 226 U. S. 590-7-8;

Louisville & N. R. R. Co. v. Smith, 204 U. S. 551-6;

Thomas v. Iowa, 209 U. S. 258-63;

Harding v. Illinois, 196 U. S. 78, 86;

Clarke v. McDade, 165 U. S. 168, 172;

Miller v. Cornwell Ry. Co., 168 U. S. 131-4;

Sayward v. Denny, 158 U. S. 180-3-4.

In **Chesapeake & Ohio Ry. Co. v. McDonald**, *supra*, the question of the right of removal to the Federal Court was involved. But this court held that the point had not been adequately called to the attention of the state court and had not been considered by that court.

It has heretofore been stated in this brief the various ways in which the Federal questions were presented both in the trial court and in the State Supreme Court,

and it is believed that they were fully presented at every opportune time and that the contention of counsel for defendant in error is absolutely without foundation.

In **El Paso & S. W. Ry. Co. v. Eichel**, *supra*, the suit was on a contract and certain breaches of contract were alleged to have been committed by the railway company. The railway company took the position that the laws of the Territory of New Mexico applied, while the state court based its decision upon the general law of contracts, and not upon the law of the Territory. It does not appear that the railway company claimed that any Federal question was presented in the defense, which it interposed, and this court held that questions of the *lex loci contractus* and of the *lex loci solutionis* are questions of general law that frequently arise in litigation and do not, unless especially so claimed, constitute the setting up of a Federal right or privilege.

In **Louisville & N. R. Co. v. Smith**, *supra*, it was held that the denial of a carrier sued for damages to merchandise that it was bound by the contract of initial carrier or that it was a connecting or ultimate carrier of merchandise and bound "by the law" to receive and forward merchandise does not, in the absence of any other reference thereto, raise a Federal question under the Interstate Commerce Act.

In **Thomas v. State of Iowa**, *supra*, the first suggestion of a Federal question was in the certificate of Chief Justice of the State Supreme Court, and this court held that it was too late to raise the question for the first time in the petition for writ of error from this court or in the assignments of error in this court.

The case of **Harding v. Illinois**, *supra*, was one to recover taxes for certain years in the City of Chicago.

There was a contention made in this court that the proceedings were in violation of the Constitution of the United States, but this court, on examination of the record, found that the contention was not raised in the state court, and necessarily this court would not review such questions.

The case of **Clarke v. McDade**, *supra*, was a proceeding on *habeas corpus*. The writ of error was dismissed because the appeal was not taken from a final judgment, as is required by Section 709 of Revised Statutes of United States, and the court also found that the case did not present any Federal question whatever.

The case of **Miller v. Cornwell Ry. Co.**, *supra*, was one to recover damages for personal injuries sustained through the railway company's negligence. Under a state statute, the contention of the railway company in this court was that this act was invalidated because in contravention of the Fourteenth Amendment, but it had not made such a contention in the state courts. It had merely claimed in those courts that the act was unconstitutional and void, and such a contention was equally applicable to the Constitution of the State as to the Constitution of the United States, and the state courts considered the objection as raising the question whether the State Legislature had power under the State Constitution to pass the act, and not as having reference to any repugnance to the Constitution of the United States.

It is submitted that none of the cases cited by counsel for defendant in error afford the slightest justification for their contention in view of the record in this case and in view of the decisions of this court hereinabove referred to.

It is respectfully submitted that under the facts

herein shown there is absolutely no merit in the contention that the motions should be sustained.

III.

IT WAS ALLEGED BY THE DEFENDANT IN ERROR IN HER PLEADINGS THAT THE DECEASED WAS AN EMPLOYE OF THE RAILWAY COMPANY, AND THIS FACT WAS ADMITTED BY THE PLEADINGS OF THE RAILWAY COMPANY.

Counsel for defendant in error here contend that the State Supreme Court held that it was not shown by the pleadings that the deceased was an employe of the railway company. The opinion of the State Supreme Court on rehearing contains the following:

“From the pleadings alone, it is clear that the deceased suffered the injuries which resulted in his death while he was employed by the express company, and not while he was employed by the railway company, and that the parties did not attempt to join issue of fact upon that question” (Appendix, p. 281).

The contention of counsel for the railway company and the holding of the State Supreme Court are directly contrary to the facts as shown in the record.

The petition of the defendant in error, without reference to the other pleadings or the evidence, charges that the deceased was an employe of the railway company as baggageman upon a train operated through the States of Missouri, Kansas and Oklahoma, and that the run for this baggageman was between Parsons, Kansas, and the State of Texas, through the State of Okla-

homa, thereby bringing the case squarely within the Federal Employers' Liability Act.

This petition (Appendix, p. 142) contains the following allegations:

"And as such, during all of said times, has been engaged in the railroad business in the States of Kansas and Oklahoma, and elsewhere, as a common carrier of freight, express and passengers for hire" (Par. 1, Petition).

"That during all the time mentioned said defendant corporation, as a part of its said railroad business, owned, and was engaged in operating a certain line of railroad extending from Saint Louis, Missouri, southerly to Parsons, Kansas, and thence from Parsons, Kansas, southerly to the stations of Verdark and Muskogee, in the State of Oklahoma, to points in the State of Texas, over which line of railway said defendant, during all the times herein mentioned, was actually engaged in carrying and transporting freight, express and passengers for hire by trains of cars drawn by steam locomotives by it owned, operated and maintained; that said line of railroad consisted of what is known as single track line, and was, and is, of the usual form of construction, and by said defendant owned and maintained" (Par. 2, Petition).

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"That at and prior to the time and death of said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by said defendant company over its said line of railroad between said City of Parsons, Kansas, through the State of Oklahoma to points beyond in the State of Texas; that in addition to his duty and employment as express messenger. as aforesaid, **this said**

William B. West also engaged in handling passenger baggage upon the express cars of said defendant company" (Par. 5, Petition).

"That on May 15th, 1908, at about 12 o'clock noon of said day, said William B. West, in the course of his employment as hereinbefore set out, was riding in one of the express cars of said defendant company attached to one of the regular trains of said defendant company over said railroad line in a southerly direction in the State of Oklahoma, which train was one of the regular passenger trains of said defendant known as 'No. 5' and also known as the 'Katy Flyer,' and that when said train reached the point in said State of Oklahoma a short distance southerly of the Arkansas River, between the said stations of Verdard and Muskogee, in said State of Oklahoma, said train upon which the said William B. West was so riding, in the performance of his duties as aforesaid, was, by said defendant railroad corporation, through gross carelessness and negligence upon its part, etc. * * *" (Par. 6, Petition.) (Appendix, pp. 143-144.)

These allegations are the only statements contained in the petition that attempt to throw any light upon the right of the deceased to be upon the train at the time of the accident.

Under very similar allegations of a petition in the case of **M., K. & T. Ry. Co. of Texas v. Reasor** (Texas Civil Appeals), 68 S. W. 322, it was held that the petition alleged facts showing that the plaintiff was in the employ of the defendant railway company.

In the **Reasor** case, the plaintiff was an express messenger and baggageman, just as was the deceased in the case at bar. The railway company was sued on account of injuries which he sustained by reason of a

collision of its trains. The question of the sufficiency of the complaint to charge that Reasor was an employee of the railway company was before the court for consideration, as recovery was sought on the theory that he was such an employee. The Court said:

“The Court charged the jury, in substance, that it was the duty of the defendant to accept and transport on its trains the baggage of passengers, and, even though the plaintiff was on the train in question as express messenger, still, if he, during the time he acted as messenger, also served the defendant as baggageman on such trains, and if he did so with the knowledge, consent and approval of the defendant, then the defendant owed to him the duty to use ordinary care to avoid injuring him. And the jury was instructed to find for the plaintiff, if he was so acting as baggageman, and was injured as a result of the negligence of the defendant. These charges are objected to on the ground that the plaintiff’s pleadings did not raise such issue.” The petition contained the following averment: ‘That heretofore, to-wit, on November 12, 1900, and for a long time prior thereto, plaintiff was an employee of the American Express Company and of the defendant, the Missouri, Kansas & Texas Railway Company of Texas, and of each of them, jointly and severally, or was employed by said express company, and was required to handle express and baggage transported on said railway company’s (defendant’s) passenger trains; that it was his duty, in the course of his employment, with the knowledge, consent and procurement of defendant, to travel on the passenger train of the defendant company between the cities of Sherman and Denison, in said Grayson County, Texas, to carry, control, manage, receive and discharge freight, baggage and parcels trans-

ported by said American Express Company, and by the defendant, the Missouri, Kansas & Texas Railway Company of Texas, as a carrier of passengers between said two cities of Sherman and Denison, and over the line of railway and in the cars of said defendant company, for said American Express Company and said defendant railway company, and both and each of them, jointly and severally, as aforesaid.' We think the plea fairly raised the issue submitted in the charge. It is distinctly alleged the plaintiff was acting as baggageman of the defendant, and was not working solely in the capacity of messenger of the express company. The plea was sufficient to notify the defendant that the plaintiff would attempt to prove, and would rely upon, his service as baggageman of the defendant, as a basis for a recovery. The plea was good on general demurrer."

It will be observed that the language quoted from the petition in the opinion above referred to is substantially the same as the language in the petition in the case at bar. In the Reasor case, the allegations of the petition alleging the manner in which the injured party was employed by the railway company is as follows:

"Was employed by said express company and was required to handle express and baggage transported on said railway company's (defendant's) passenger train."

This is identically what the plaintiff in error in the case at bar charged the facts to be, and it is clear from a reading of the opinion of the court in the **Reasor case** that it considered that language in itself sufficient to charge that the relation of master and servant existed

between the plaintiff and the defendant, railway company. The Court said:

“We think the plea fairly raised the issue submitted in the charge. It is distinctly alleged that the plaintiff was acting as baggageman of the defendant and was not working solely in the capacity of messenger of the express company.”

Unquestionably, the defendant in error herein sought to hold the plaintiff in error liable because it occupied the relation of master to the deceased. Unless such a relation did exist, the petition does not state a cause of action, because it does not show any right in the deceased to be upon the train. The allegation of the petition that he was an express messenger does not show a right to be upon the train, and it is not followed up by any allegation showing such a right either by virtue of contract between the railway company and the express company or in any other manner.

The petition does not even charge that the express company was engaged in carrying express matter, but, on the contrary, expressly charges that the railway company was so engaged, and that the deceased was, at the time of the injury, upon the express cars operated by the railway company, and was performing his duties as express messenger and baggageman. The petition can fairly be construed to charge that he was acting as an employe of the railway company, both as to express and baggage, but after giving the defendant in error the benefit of every doubt, it cannot be otherwise construed than as charging a joint employment by the two companies, and it is clear that such was the intention when the petition was drafted.

Under the allegations in this petition as to the duties

of West with respect to this baggage, suppose a prospective passenger going to the train or a passenger leaving the train had been injured by the negligent act of West in putting baggage out of the car, or suppose the baggage in his charge had been lost or injured. Would this court for a moment consider an argument on the part of the railway company that West was not its employe and was, therefore, not liable for his acts to the same extent as it would be liable for the acts of any other of its agents, servants or employes?

The Railway Company demurred to this petition. One of the grounds of this demurrer is as follows:

“That the petition does not state facts sufficient to constitute a cause of action on behalf of the plaintiff” (Appendix, p. 146).

This demurrer was overruled by the trial court upon the theory that the allegations of the complaint were sufficient to charge that the deceased was in the employ of the railway company and therefore thus showed the right of the deceased to be upon the train at the time of the accident.

The Court overruled the demurrer upon that theory, as no other possible theory could be advanced for overruling the demurrer to the petition, as the petition did not charge that the American Express Company had any contract with this plaintiff in error, or any other person, to handle the express, and it is not charged that the American Express Company is engaged in handling express. The only inference to be drawn from these allegations is that the deceased was employed by the American Express Company as express messenger and baggageman for the plaintiff in error.

If this is not true, then the deceased was a trespasser

and the petition would wholly fail to state a cause of action.

After this demurrer was overruled the railway company filed its Answer consisting of a general denial. (Appendix, p. 147).

The railway company thereafter filed its First Amended Answer alleging, among other things, the fact that both of the trains involved in this collision were at the time engaged in moving interstate commerce (Appendix, p. 147).

The railway company thereafter filed its Second Amended Answer (Appendix, p. 148), containing the same allegations as to the interstate character of the train and also alleging two applications for employment made by the deceased to the American Express Company, which applications contain accident release contracts between the express company and the deceased, the benefits of which inured to the railway company.

The railway company thereafter filed its Third Amended Answer (Appendix, p. 154), and this is the answer upon which the case was tried, and the one to be considered by this Court in determining the sufficiency of these motions.

This Third Amended Answer contains all of the allegations of the previous answer, together with the applications for employment and accident release contracts. During the course of the trial the railway company was permitted to amend this answer by alleging a third application for employment designated in the record as "Exhibit C." The Court declined to permit any of these applications to be introduced in evidence (Appendix, pp. 168-170). The accident release contracts contained in these different applica-

tions for employment are substantially the same, and the one included in the application designated "Exhibit B" appears in the Appendix, at page 159.

The allegations of this answer which show clearly that this action is controlled by the Federal Act are as follows:

"Further answering, defendant states that it is now and was at all times mentioned in plaintiff's petition, a common carrier by railroad engaged in commerce between the several states, and that the passenger train described by plaintiff in said petition as the "Katy Flyer" was at all times mentioned therein, an interstate train, starting from St. Louis, in the State of Missouri, and passing into and through the States of Kansas and Oklahoma, and thence into the State of Texas, and at all times therein mentioned was engaged in the movement of interstate commerce, and defendant further states that the said freight train described in plaintiff's said petition, was on the said 15th day of May, 1908, a train starting from Muskogee, in the State of Oklahoma, and proceeding on its way over the defendant's line of railway to Parsons, in the State of Kansas, and was on said date, and at all times mentioned in plaintiff's petition, engaged in moving interstate commerce.

* * * * *

"Further answering, defendant admits that at and prior to the death of the said William B. West, deceased, he was employed by the American Express Company as express messenger upon the express cars operated by the defendant railway company over its line of railroad between the City of Parsons, Kansas, through the State of Oklahoma, to points beyond in the State of Texas, and admits that the deceased, William B. West, in addition to his employment as express messenger by the said

American Express Company, was also engaged in handling passenger baggage upon the express car of the said defendant railway company **and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by the said American Express Company, and that such handling of such baggage by said West was for and in behalf of and under the direction of said railway company**" (Appendix, pp. 154, 158).

The Court will note that this language of the answer undertakes to follow the words of the petition admitting the above, but adding thereto the words above quoted in bold-face type, to-wit:

" * * * and defendant railway company states that said William B. West, deceased, in performing said duties in handling said baggage, was doing so under and by virtue of his said employment by the said American Express Company, and that such handling of such baggage by said West was for and in behalf of and under the direction of said railway company."

Counsel for defendant in error undertakes to argue that this answer admits that the deceased was employed solely by the express company and negatives the fact that he was also employed by the railway company. The answer cannot fairly bear any such construction.

To support these sweeping statements, which are entirely at variance with defendant in error's own pleadings in the case and with the record, counsel for defendant in error quote a small portion of one sentence of this answer. The quotation does not even begin at

the beginning of a sentence or end at the end of a sentence. The allegations of the answer admitting the employment of West by the express company, which are in no sense denied, are simply a retracing of the allegations of the petition of the defendant in error such as would be rendered necessary by reason of the practice so long in vogue in Indian Territory before the advent of Statehood, and in addition to these allegations, which are clearly admitted by both parties, this answer contains the following positive allegation:

“And that such handling of such baggage by said West was for and on behalf of and under the direction of said railway company.”

This third amended answer, read as a whole, pleads that West was both an employe of the railway company and the express company, and no other construction can fairly be placed upon it.

If there were the slightest merit in the contention of counsel for defendant in error that this answer does not allege that the deceased was in its employ, the defendant in error is certainly not in position to take advantage of it because as heretofore shown her own petition sufficiently alleged such employment but more especially because of the reply which was filed to the third amended answer. This reply appears at page 162 of the Appendix. In this Reply the defendant in error pleads the following statute of Kansas, quoting same in full in the reply:

“Also as follows, to-wit: Every railroad company organized and doing business in the State of Kansas shall be liable for all damages done to any employe of said company in consequence of any negligence of its agents or by any mismanagement

of its engineers or other employes, to any person sustaining such damage." "Provided, that notice in writing that an injury has been sustained, stating the time and place thereof shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury" (Appendix, p. 163).

It will be noted that this statute of Kansas, which is pleaded in this Reply is enacted solely for the benefit of employes of railway companies, and unless the contention of the railway company is correct that this suit was brought by the defendant in error and maintained by her on the theory that West was an employe of the railway company she certainly would not have pleaded this statute of Kansas, which absolutely binds her to the position that West was an employe of the railway company, because this statute by its express terms inures solely to the benefit of such employes. It certainly has no proper place in her pleadings if the position which her counsel now take is the same as that assumed by them at the trial in the State court.

Furthermore, this same Kansas Statute was introduced in evidence by counsel for defendant in error (Appendix, p. 170).

It is submitted that taking these pleadings separately or taking them together as a whole, that they show without question that both defendant in error and the railway company took the position that the deceased was an employe of the railway company. The facts as alleged by both parties were sufficient to show that the action was controlled by the Federal statute.

Counsel for defendant in error lay stress upon the case of **M., K. & T. Ry. Co. v. Blalack** (Supreme Court of Texas), 147 S. W. 559. It is submitted that this

Blaylack case instead of supporting the contention of defendant in error is direct authority for the contention of the railway company.

The pleadings and record in the case at bar tested by the opinion in the **Blalack** case, show that the plaintiff in error in this **West** case introduced, or offered to introduce, the evidence which the Supreme Court of Texas held might have been introduced for the purpose of showing that the injured person was in the joint employ of the railway company and the express company.

In the **Blalack** case the Court said:

“The defendants in error claimed that Frank Blalack, the husband of Mrs. Linnie Blalack, father of the minors, and son of Mrs. M. B. McKinnie, was an agent of the express company, employed and paid by it, and entitled to ride upon defendant’s cars under the contract between the companies.

“The evidence, which might have been, but was not, controverted, sustained plaintiffs’ allegation, and showed that Blalack was on defendant’s train as a passenger. The railroad pleaded that Blalack was in its employ at the time; but the only proof offered was that Blalack handled baggage, which was the work of an employee. There was no proof of any employment of Blalack by the railroad company, nor of the payment of any part of his wages, nor of any right of control over him. If the facts existed, it was so easy to have produced the evidence that the failure to do so impresses upon the mind a conviction that the claim was unfounded. The defendant was required to prove that the deceased was in its employ, in order to avail itself of the federal law; and, having failed, the state law governed.”

It will be noted that the first proposition presented

in the Blalack case, is that the railway company pleaded that Blalack was in its employ at the time. The opinion does not show what language was used in the pleadings to disclose such employment, but in the case at bar, as has heretofore been fully presented, the defendant in error, in her petition, alleged facts showing that West was an employe of the railway company, and clinched these allegations by her reply to the answer of the railway company, in which reply she plead a statute of Kansas enacted solely for the benefit of railway employes, and applicable in its terms only to railway employes, and, furthermore, she proved this statute at the trial, and relied upon it in an effort to show that the released contracts offered in evidence were void.

Counsel for defendant in error contend that the deceased was a passenger and that the rules as to liability of the railway company towards passengers control, and in this connection cite several cases in some of which the injured party was an express messenger, and in others a railway mail clerk. Railway mail clerks stand on a somewhat different footing from express messengers, as the railway company is obliged to carry them as passengers in the mail cars under certain acts of Congress. There are numerous cases in the books defining the duties which the railway company owes to express messengers solely in the employ of the express company and handling express matter exclusively, but these cases are neither authority for nor against the proposition here discussed, and in none of the cases cited by counsel for defendant in error was the express messenger also an employe of the railway company and engaged in handling baggage for the railway company as its baggageman as in the case at bar. The case at

bar comes within the Federal statute because of this employment by the railway company.

However, all of this discussion as to the pleadings seems to stand for naught in the light of the opinion of this Court in the **Seale case** hereinbefore referred to. The **Seale case** makes the evidence introduced the controlling feature in determining whether the case is one within the Federal statute rather than the pleadings. The facts introduced at the trial and sought to be introduced are the determining factors in this case. Under the evidence admitted the deceased was shown to be an employe of the railway company and the express company. This evidence will be more fully discussed under the next subhead of this brief, and it will be there shown that the evidence was conclusive and undisputed that the deceased was an employe of the railway company.

In this **Seale case** the interstate employment of the deceased was not pleaded at all, as is shown by the opinion of this Court and as is also shown in the opinion in the same case written by the Court of Civil Appeals of Texas (148 S. W. 1099), from which Court this case went to the Supreme Court of the United States. In the opinion of the Texas Court it is said:

“The statutes of Texas authorize a recovery by plaintiffs as set forth in their petition, and there was no pleadings by defendant setting forth as a defense to said cause the Act of Congress approved April 22, 1908, entitled ‘An act relating to the liability of common carriers by railroads to their employes in certain cases,’ commonly called the ‘Federal Employer’s Liability Act,’ which act, whatever effect it may have upon the State statutes, cannot be invoked to defeat plaintiffs’ right

of recovery in this suit, as it was in no way pleaded by defendant." (Bold-face type ours.)

Under the opinion of this Court it was not necessary, as claimed by counsel for defendant in error, to allege that West was an employe of the railway company in order to make the Employer's Liability Act available. In the Seal case Mr. Justice Van Devanter, delivering the opinion of the Court, said:

"In our opinion, the evidence does not admit of any other view than that the case made by it was within the Federal statute. * * * It was to the case therein stated that the defendant was called upon to make defense. A plea in abatement would have been unavailing because the plaintiffs were the proper parties to prosecute that case. When the evidence was adduced, it developed that the real case was not controlled by the State statute, but by the Federal statute. In short, the case pleaded was not proved, and the case proved was not pleaded. In that situation, the defendant interposed the objection grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time, and that the State courts erred in overruling it." (Bold-face type ours.)

Conceding for the sake of argument that the portion of the railway company's answer upon which counsel for defendant in error lay such great stress alleges that West was the employe of the express company solely, the issue as to his employment by the railway company would still be raised by the general denial, and the answer would present two defenses to the cause of action.

A defendant has the right to plead as many defenses as the probable state of facts may warrant. If the facts develop, as they did in this case, that West was an employe of the railway company, then there could be no recovery under the Federal Employers' Liability Act; on the other hand, if the facts had developed, which they did not, that West was in the exclusive employ of the express company, he and his beneficiaries effectually released the railway company from any damages on account of any injuries or his death.

IV.

THE EVIDENCE CONCLUSIVELY SHOWS THAT THE DECEASED WAS AN EMPLOYE OF THE RAILWAY COMPANY, AND THE RECORD LIKEWISE SHOWS THAT SUCH WAS THE UNDERSTANDING OF THE TRIAL COURT AND OF ALL PARTIES.

The State Supreme Court found "that the deceased suffered the injuries that resulted in his death while he was employed by the express company, and not while he was employed by the railway company in interstate commerce within the meaning of the Federal Employers' Liability Act" (Appendix, p. 285).

It is urged on the part of the railway company, and the record fully supports this contention, that both the pleading and the evidence without contradiction show conclusively that West was the employe of the railway company at the time of the injury, in addition to his employment with the express company, and it is believed that in so far as the question of pleadings is concerned, that it has been shown to the satisfaction of this court that this holding of the State Supreme Court is not in accord with the record.

The holding of the State Supreme Court as to the evidence is likewise at variance with the record and under the decisions of this court, hereinbefore referred to, this court will examine the record and the evidence to determine these questions which are now controverted.

It is not deemed necessary to refer particularly to the testimony of the defendant in error, the widow of the deceased. She stated in substance that her husband was working for the American Express Company as an express messenger. This fact is not controverted. She was not interrogated by either side touching his employment with the railway company and her testimony is therefore silent on that proposition.

Counsel for defendant in error call attention in their brief to the testimony of Mr. Bird, superintendent of the express company, to the effect that the deceased worked under his direct supervision. The testimony of Mr. Bird was clearly directed to the employment of West as express messenger as distinguished from his employment by the railway company. So far as West was performing duties for the express company, there is no question but what he worked under the supervision of the superintendent of that company.

The testimony of F. D. Adams, general superintendent of the Southern Division of the American Express Company, is conclusive upon the proposition that West was the joint employe of the railway company and the American Express Company. The entire testimony of Mr. Adams is contained in the Appendix, page 172. Pertinent extracts are as follows:

“Q. Now what was that relation, Mr. Adams (relation between the deceased and the railway

company)? A. Well, he^s was joint messenger and **baggage**man.

"Q. By joint, do you mean joint with the M., K. & T. and the express company? A. **Worked for both companies**; yes, sir.

"Q. Do you know what proportion of his salary was paid by those companies, or whether it was paid in any proportion? A. Equal division.

• • • • •

"What were Mr. West's duties with respect to the railway company as to handling the baggage, Mr. Adams? A. Received the baggage at the stations, made a record of it, and put it off at its destination in the same manner any baggage^man did. (Rec., p. 176.)

• • • • •

"Q. Do you know whether Mr. West, at the time he was employed as messenger, knew that he was to handle the baggage of the railroad company and **act as joint employe** of the railroad company and the express company? A. He did, and was **told to post himself in the work of both companies**" (Rec., p. 177).

On cross-examination, Mr. Adams testified as follows:

"Q. Who paid Mr. West? A. He drew his money from the express company.

"Q. All of his salary came from the express company? A. Yes, sir.

"Q. And for any work he done for them in handling baggage, the railway company would pay over to the express company? A. **They paid us one-half of his salary**; we drew a bill against them in his name and the other baggage^men" (Rec., pp. 177-178).

This testimony was offered for the purpose of show-

ing West's employment by the railway company, as was expressly stated to the court and in the record by counsel for the railway company as follows:

"Mr. Ralls: We offer this for the purpose of showing that the deceased was a joint employe of the American Express Company and the M., K. & T. Railroad Company while he was running as messenger on the line" (Rec., p. 174).

* * * * *

"Mr. Allen: We offer to show by Mr. Adams, that at the time Mr. West went into service as messenger, he understood that it was his, West's, duties to perform joint services for the railway company and the express company" (Rec., p. 176).

It is not deemed necessary to say anything further on this proposition. An extended argument might be indulged in showing wherein this testimony shows that West was employed by the railway company, but no argument could make the fact any clearer than the testimony itself.

In connection with the testimony of Mr. Adams, the railway company offered in evidence a circular letter signed by Mr. Adams, as superintendent, directed to "Joint Messenger and Baggage-men on M., K. & T. Lines" and further offered to show that West received one of these letters, and that he was one of the joint employes for whom it was intended (Appendix, p. 177).

This communication shows conclusively that the deceased was an employe of the railway company, and is as follows:

“St. Louis, Mo., July 21st, 1897.

“*To Joint Messenger & Baggage men,*

“*On M., K. & T. Lines.*

“GENTLEMEN :—

“In some instances I find there has been considerable controversy between messengers and train crews on joint runs in regard to your duties to the railroad company. Inasmuch as the railroad company pay a portion of your salary, you are just as much an employe of the railroad on which you run as you are of the express company, and you must be just as careful of their interests as you are of this company and perform your duties to that company, as near as possible in the same manner that they would be performed by exclusive baggage men. In the event of any controversy between yourselves and flagmen, or porters, you should refer the matter to the conductor and carry out his instructions.

“There has been some difficulty in regard to the handling of train boxes in baggage cars, some messengers insisting that there was not room in the baggage end of the car and they should be carried on the platform. It does not matter where the space in your car is, in the express or baggage end, if there is room in the car anywhere the box should be carried there, if requested to do so by the train men.

“There is no reason why the joint business cannot be handled successfully and in harmony with the train crews and I want you to take up with the Train Master of your Division, or the General Baggage Agent, any matter of interest of the railroad company. Any difficulties between yourselves and train men can, and unquestionably will, be settled by the conductor in charge of the train, if appealed to. There is no disposition on the part of either company, in whose service you are, to impose upon

you duties that you cannot perform, and I know very well that **the Superintendents and Train Masters of the railroad company will sustain you** where it is shown that you are endeavoring to perform your duties satisfactorily.

“There has been no serious complaint, but it must be understood that **the instructions of the railroad company are to be complied with**, where the same do not conflict with the standing rules of this company in regard to the care of money and valuable. (Bold-face type ours.)

“Yours truly,

(Signed) “F. D. ADAMS,

“*Superintendent.*”

(Appendix, p. 177.)

It is true that the trial court declined to admit this circular in evidence, and in doing so it committed error, and it is also true that in the original brief of the railway company filed with the State Supreme Court in this cause, the error of the trial court in this respect was not argued because that brief was written upon the theory that West was an employe of the railway company and that the fact was not controverted and it had not been up to that time. The record fully bears out this contention.

The evidence offered by the railway company contained in this circular was corroborative of the other undisputed evidence that the deceased was its employe, and the parties by their pleadings and in the trial of the case assumed as an established fact that the deceased at the time of the accident was an employe of the railway company.

This fact as to the employment of the deceased was not denied by the defendant in error until her counsel filed their brief in the State Supreme Court, and coun-

sel for the railway company had no reason whatever to believe that counsel for defendant in error, in view of this record, would assume the position which they did in their brief, namely, that there was no proof of this joint employment.

There was no necessity whatever for presenting to the State Supreme Court the error of the trial court in excluding this testimony, and if such error had been presented in the original brief of the railway company, the brief would have been subject to the criticism that it was inconsistent. Had counsel for the railway company the slightest intimation that counsel for defendant in error would take the position which they did in their brief, which is entirely at variance with the record, and that the state court would have adopted that position as correct, regardless of this inconsistency, counsel for the railway company would have presented to the state court in its original brief, as it did in its briefs filed thereafter, the error of the trial court in refusing to admit this circular in evidence.

This argument of counsel for defendant in error that the evidence does not show that the deceased was an employe of the railway company is rendered all the more unfair when it is recognized that on their own objection they induced the trial court to refuse to permit the railway company to prove this circular when it offered to do so.

It will further be noted that this circular was not excluded by the trial court on the ground that the evidence therein contained was not competent or that there was any dispute as to the employment of West by the railway company, but upon the erroneous theory that it constituted a communication with a deceased person.

In this connection, counsel for defendant in error again call attention to the case of **M., K. & T. Ry. Co. v. Blalack** (Supreme Court of Texas, 1912), 147 S. W. 559, *supra*, which has heretofore been referred to in connection with the argument touching the pleadings. This **Blalack case** fully supports the contention of the railway company. In the **Blalack case** it was held by the Texas court that sufficient evidence was not introduced to show that Blalack was a joint employe of the express company and the railway company. In the case at bar ample evidence was introduced and was undisputed.

It is stated in the opinion in the **Blalack case** that the only proof offered to show that Blalack was an employe of the railway company was that Blalack handled baggage. In this respect, the record in the **Blalack case** and the case at bar differ, and the difference is such as, under the doctrine of the **Blalack case**, to make West the employe of the railway company, as well as the express company.

In the case at bar the railway company did more than to show that West handled baggage. In the **Blalack case** it is conceded that there was no proof of any employment of Blalack by the railway company, nor of the payment of any part of his wages nor of any right of control over him.

In the case at bar proof was made that West was a joint employe of the railway company and the express company, and that the railway company paid one-half of his wages, and proof was sought to be made that the railway company exercised the right of control over him, but this latter item of proof was not admitted by the court.

While the question of the payment of salary is a

circumstance to be considered in determining whether the relation of master and servant exists, it is by no means controlling, and the deceased could be the servant of the railway company whether it paid his salary, or any portion thereof, either directly or indirectly, or if it paid him no salary at all, and the Texas court in the **Reasor case**, above quoted from, goes so far as to hold that the fact alone that Reasor acted as baggage-man with the consent and approval of the railway company was sufficient to make him its servant. The Court said:

“The Court instructed the jury that the evidence was not sufficient to warrant the conclusion that there was such express contractual relation between the plaintiff and the defendant as to constitute the relation of master and servant; and appellant contends that, such being the case, a peremptory instruction to find for the defendant should have been given. The contention cannot be sustained. An express contract was not necessary to create the relation of master and servant. **The relation existed if the plaintiff, with the knowledge, consent and approval of the defendant, acted as baggageman, and in that capacity performed duties which it owed to the public. In such case, he would be as much the servant of the company as if he had been working under an express contract of employment.** (Bold-face type ours.)

“The plaintiff was permitted to prove, over the objections of defendant, that the express company deducted from the wages of the plaintiff, and of all other employes who acted both as messengers and baggagemen, the sum of 50 cents per month as hospital fees, for the defendant's hospital; the fees not being deducted where the employe acted only as messenger. We are of the opinion that the evi-

dence was admissible as a circumstance tending to show the existence between the defendant and the plaintiff of the relation of master and servant. While it was not directly shown that the railway company required the fees to be collected of such employes for its hospital, it is inconceivable that this should be done without its knowledge, or except in compliance with a demand by it to that effect. If the railway company had these fees collected from express messengers who served it as baggagemen, the fact tended to show upon what terms the services were rendered, and threw light upon the relations existing between the parties."

The facts in the case of **Vary v. B. C. R. & M. R. Co.**, 42 Iowa 246, present identically the same question presented in the case at bar, and show a payment of salary in identically the same way as in the case at bar. In the statement of facts preceding the opinion of the Court, it is said:

"the plaintiff, in his petition, states that the defendant is a corporation under the laws of Iowa, engaged in the business of a common carrier of freight and passengers along its line of railroad, through Linn County, Iowa; that 'on a day in 1872, the plaintiff was in the employment of the Chicago & Northwestern Railway Company as a switchman, at Cedar Rapids, Iowa, and it became his duty as such to switch and couple and uncouple all the cars of both the Chicago & Northwestern Railway Company, and the defendant, the B. C. R. & M. R. Co., in the freight yard at Cedar Rapids, the same tracks and warehouses being used by both companies for such purposes; and plaintiff was paid jointly for his services by both companies, but received his pay from the Chicago & Northwestern Railway Company alone, and the

defendant company paid the Chicago & Northwestern Railway Company its share.' (Bold-face type ours.)

"It is further alleged that, during such service and employment, 'it became the duty of plaintiff to couple together two cars belonging to the defendant standing upon a side track at Cedar Rapids, and while plaintiff was coupling said two cars, using all due care and prudence, by reason of the drawbars of both said cars being out of repair, which was unknown to plaintiff, but well known to the defendant, the drawbars were shoved in and the dead-woods came together, and by reason of which plaintiff's hand was caught between the dead-woods of said cars, and his thumb and two fingers crushed, and by reason of which the plaintiff has lost his thumb and two fingers, thereby greatly and permanently injuring him for life, causing great pain and suffering, and to his damage five thousand dollars; that such injury was caused by the negligence of the defendant in not keeping its cars and the drawbars of same in reasonably good repair, and without any fault or carelessness of plaintiff. Plaintiff has been further damaged by reason of the premises in the sum of five hundred dollars, by loss of time and surgeons' bills paid by him. Wherefore, plaintiff asks judgment'."

A demurrer was interposed to this petition on the ground, among others, that it did not show that the relation of master and servant existed. The Court said (page 248):

"We do not deem it necessary to discuss and decide the question whether it is essential to the right of the plaintiff to recover for personal injuries caused to him through the negligence of a

railroad company that the relation of master and servant should exist, since, as we understand the allegations of the petition in this case, this relation is shown to have existed. The effect of these averments is, that by virtue of an arrangement or agreement between the plaintiff and the two railroad companies named, it was the duty of plaintiff to switch and couple and uncouple the cars of both railroads; that although he was in the general employment of the Chicago & Northwestern Railway Company, he was jointly paid by both companies, and it was his duty and a part of his work and employment to perform certain services for the defendant; that at the time of performing these services, he was injured by reason of the negligence of defendant while engaged in performing this service for the defendant, with the knowledge and agreement on its part that plaintiff should perform this service, and for which defendant agreed to and did pay, plaintiff was the servant of defendant. (Bold-face type ours.) He was performing services for defendant under an agreement that he should do so, and for which the defendant was to and did pay.

“These facts are sufficient to create the relation of master and servant, and the fact that plaintiff was in the general employment of another company, does not change the matter, since a person may be the general servant of one and the special servant of another; that is, he may perform special services for one while he is the general servant of another, and while performing such special service, he will be the servant of the one for whom such services are performed, as to that particular service.”

In the case of **Oliver v. Northern Pacific Railway Company** (E. Dist. of Wash.), 196 Fed. 432, 435, a

porter on a Pullman car was injured, and sued the railway company under the Federal Employers' Liability Act. It was contended on the part of the railway company that he was not an employe of that company, and therefore could not receive the benefits of the act. The manner in which the Pullman cars were operated, was evidenced by an agreement in the record, which is thus stated in the opinion of the Court:

"The cars owned jointly by the Railway Company and the Pullman Company shall be known as Association cars; the Pullman Company having the management thereof; and all obligations of the Pullman Company with respect to the operation of said cars shall be assumed and borne by the Association * * * The Association shall furnish with each of such sleeping cars, one or more employes, as may be required, whose duties shall be to collect fares from passengers occupying such cars, for the use of seats or berths, and generally to wait upon and provide for the comfort of passengers therein; such employes at all times to be subject to the rules of the railroad company governing its own employes. The Association shall also furnish employes who shall have charge of all the sleeping cars used under this contract."

The Court said:

"The porter was undoubtedly an employe of the Association within the meaning of this provision. The question then arises, Is a person employed jointly by a railway company and another company in the operation and management of a train, an employe of the railway company, within the meaning of the Employers' Liability Act? In my opinion, this question must be answered in the af-

firmative. The contract between these two companies was entered into long prior to the passage of the act in question, and was therefore not entered into for the purpose of circumventing or avoiding liabilities imposed by law. Nevertheless, if such a contract is recognized and given the effect claimed for it by the defendant, there is nothing to prevent railway companies from avoiding obligations imposed upon them by this or other laws of Congress. It was attempted, in argument, to draw a distinction between those positive obligations imposed upon public service corporations by law and obligations voluntarily assumed by them for the comfort and convenience of passengers, and for their own profit. Such a distinction may, and, in some cases, does, exist, but it cannot be gainsaid that persons employed by railway companies in performing obligations voluntarily assumed, are as much employees of the company as those servants who are discharging positive duties imposed by law. Persons employed as the deceased was, come within the spirit of the statute, and those dependent on them for support should not be denied the protection it affords."

While the facts in this **Oliver** case are somewhat different, the reasoning applies equally well to the case at bar, and the facts in the case at bar certainly point more strongly to direct employment by the Railway Company than in the **Oliver** case.

In **Ringue v. Oregon Coal & Navigation Co.** (Ore. 1904), 75 Pac. 703, the plaintiff was a miner working with his father, who was employed in the defendant's mine. The defendant paid the father for the work performed by him and his son. It was customary for a father who desired to have his minor son assist him, to obtain from the bookkeeper an order on the black-

smith for a one-half set of tools, and to request the underground boss to furnish an extra car for the boy. There was no evidence of a direct contract of the plaintiff with the defendant, or that the father obtained the order from the bookkeeper on the blacksmith for tools for him. The boy was injured while working in the mine. The Court said (page 705):

“By these instructions, the plaintiff’s right to recover was made to depend upon his employment by the defendant, and the jury must necessarily have understood he was not entitled to recover unless there was an actual contract of employment, even though he may have been working at the mine at the request of his father, with the defendant’s permission and consent, and for its benefit. The complaint proceeds on the theory that, at the time of the accident, the relation of master and servant existed between the plaintiff and the defendant. This was denied, and was therefore a material issue in the case. The plaintiff must recover, if at all, upon the cause of action as alleged; and the burden of proof was upon him to show such a state of facts as, under the law of negligence, would constitute the relation of master and servant. We do not understand, however, that it was necessary for him to prove a direct contract by some authorized agent of the defendant, employing him, or that his right to work was included in the terms of the contract with his father. If, as the evidence tended to show, he was going into the mine at the time of the accident by the request of his father, with the permission or consent of the defendant, express or implied, for the purpose of performing work or labor for it, he was not a trespasser or a licensee, but was rightfully in the mine, and the relation of master and servant existed between him and

the defendant, within the meaning of the rule requiring a master to exercise reasonable care to prevent injury to his employees."

* * * * *

(P. 706) "Under the law, therefore, even though there was no direct contract of employment, the plaintiff was entitled to the protection of a servant, if, with the knowledge and consent of the defendant, he was in the mine for the purpose of rendering services for its benefit, and the case should have been submitted to the jury upon that theory. The instructions, as given, however, were to the effect that plaintiff could not recover unless he was actually employed by the defendant, or was authorized, under the terms of his father's employment, to work for it. It is stated in one of the instructions, that the duty of the defendant to exercise reasonable care, and to furnish the plaintiff a reasonably safe place in which to work, would 'only exist in case plaintiff was employed by the defendant', and in another, that if, by the terms of the contract under which the father worked, plaintiff was to assist him, and entered the mine under such arrangement, with the permission of the defendant, it would be its duty to exercise reasonable care to provide him a reasonably safe place in which to work. His right to recover was thus made to depend upon the existence of a contract of employment, either directly with himself, or through his father, while, as we have seen, he was entitled, under the law, to the protection of a servant if he was in the mine, with defendant's consent, for the purpose of performing labor or services for its benefit; and, hence, there was error in the instructions."

In *Rummell v. Dillworth*, 111 Pa. 343, 2 Atl. 355, 356, the Court said:

"The defendants, Dillworth, Porter & Co., Limited, are the owners of a spike-mill in the City of Pittsburgh. The plaintiff was, at the time of the injury complained of, an operative, or laborer, in that mill. He was employed by William Richards, the roller boss, and was paid by him, but whether he was directly in the defendant's employ, or indirectly as the assistant of Richards, he may be treated as their employe. He was engaged in the work of the defendants, upon their machinery, and the defendants were themselves operating the mill. The right of the roller boss to employ assistants is clearly shown; and as it does not appear that he was an independent contractor, it is unimportant that the amount of the compensation was measured by the number of tons manufactured. The plaintiff was not a trespasser; he was in the rightful discharge of the duties of a valid employment. The relation of master and servant is fairly inferable from the proofs, and the defendants are therefore bound to the performance of all the duties, and are entitled to the protection which that relation affords."

In **Goodrich v. K. C., C. & S. Ry. Company** (Sup. Ct. Mo. 1899), 53 S. W. 917, the plaintiff, in her petition, charges that the deceased, her husband, was an employe of the Kansas City, Clinton & Springfield Railway Company, and also of the Kansas City, Fort Scott & Memphis Railway Company, and that at the time of the accident the latter company had a traffic arrangement with the former company, by which the latter company ran its cars over the tracks of the former company, and was doing so at the time of the accident. The deceased was, at the time of his death, engaged in firing an engine of the Kansas City, Fort Scott & Memphis Company, which was derailed in consequence of

having struck a horse. The facts as to the manner of payment of salary are thus stated by the Court:

“There was testimony showing that the officers of the Kansas City, Clinton & Springfield Railway Company and the Kansas City, Fort Scott & Memphis Railway Company were substantially the same; that the train was sent out on the order of H. S. Mitchell, who was division superintendent of both roads; that the trains of each road ran over the tracks of both roads, and that the employes were paid by the road over which they ran—the deceased, during July, 1895, being paid partly by the one road, and partly by the other, in the proportion of the number of miles he ran over each road.”

The Court said:

“There was sufficient evidence to establish *prima facie* the allegation of the petition that, at the time of his death, the deceased was employed as fireman by the defendant company.”

These authorities fully support the contention of the plaintiffs in error that the record conclusively shows that West was its employe.

In the original opinion of the State Supreme Court, which was superseded by the opinion on rehearing, that Court erroneously held that no offer was made to produce the contract between the Railway Company and the Express Company or to show what such contract was and held that this would indicate that if this contract were in evidence it would be fatal to the contention of the Railway Company that West was its employe. In this the State Supreme Court was clearly in error, as an offer was made in the trial court to in-

roduce this particular contract (Appendix, p. 218), and the Court admitted its error by eliminating any reference to this contract in its final opinion upon rehearing.

In view of the holding of the Court in the original opinion, this contract between the Express Company and its Railway Company was made a part of the petition for rehearing and attached thereto and marked "Exhibit A". The petition for rehearing, together with the contract, appears in the Appendix on pages 86 to 130.

It will be observed from an examination of this contract that it shows conclusively that West was an employe of the Railway Company and that the assumption of the State Supreme Court that this contract would prove fatal to the contention of the Railway Company was wholly unfounded.

Article XI of the contract (Appendix, p. 231) provides as follows:

"It is further mutually understood and agreed by and between the parties hereto, that the Express Company will assume all risk and damage to its property, freight and valuable packages, and also assume all risk and damage to its agents and messengers while on said road in the course of their employment, including damages arising from the negligence or carelessness of the agents or employes of the Railway Company; provided, however, that in all cases where **the same person acts jointly as baggageman for the Railway Company and express messenger for the Express Company**, then that any sum or sums paid out in settlement or satisfaction of any claims made or judgments recovered on account of injuries sustained by **such joint employe** in the course of **such**

joint employment while upon the road of the Railroad Company shall not be assumed or borne by the Express Company, **exclusively**, but shall be borne and paid by both the Railway Company and the Express Company in the same proportion as **they may have contributed to the salary of such employe** at the time such injuries are sustained by him, but neither party, however, shall have the right to compromise or settle any claim or suit for such injuries without the consent in writing of the other party hereto."

It will further be noted that this contract also shows, contrary to the contention of counsel for defendant in error, and contrary to the original opinion of the Supreme Court and also the opinion upon rehearing that the Railway Company actually paid one-half of the salary of the deceased.

It is evident that counsel for defendant in error throughout the trial of the case proceeded upon the theory that the deceased was in the employ of the Railway Company. When counsel for the Railway Company sought to introduce in evidence the applications for employment containing release contracts entered into by the Express Company and the deceased, the defendant in error, offered in evidence the two statutes of Kansas which were pleaded in her reply, one of which in terms expressly applies to employes of railway companies and to no one else. The trial court admitted these statutes in evidence. The proceedings of the court in connection with this matter appear in the testimony of G. C. Gates, Appendix, pages 168-170. The following is an extract from these proceedings:

"Mr. Taylor: The section to which the plaintiff introduces in evidence are those contained in the

General Statutes of Kansas of 1905, on page 1257, being Sections Nos. 6311 and 6312.

“Section 6311 reading: ‘Liable for damages. That railroads in this State shall be liable for all damages done to person or property, when done in consequence of any neglect on the part of the railroad companies’ (L. 1870, ch. 93).

“Section 6312 reading: **“TO EMPLOYEE. 22. Every railroad company organized or doing business in the State of Kansas shall be liable for all damages done to any employe of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes, to any person sustaining such damage: Provided, that notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury.”**

“There is something further in that section, but nothing that relates to this case, so I will merely introduce that portion of that section unless counsel wants me to read it all” (Appendix, p. 170).

It is apparent that the trial court understood that this case was being tried on the theory that West was an employe of the Railway Company.

The trial court construed the pleadings in this case to allege the employment of West by the Railway Company as appears from the record in connection with the testimony of Mr. Adams hereinbefore referred to, and from the following extract of this testimony:

“Q. At that time do you know what relation existed between Mr. West and the M., K. & T. with reference to handling the baggage of that Company?

“A. Yes, sir.

"Mr. Taylor: I would like to ask first if there was anything in writing; any written agreement?

"By the Court: **Don't you plead Mr. Taylor he also handled passenger baggage?**

"Mr. Taylor: 'Yes, sir; we plead it' " (Appendix, p. 176).

And further in connection with the testimony of this same witness it was admitted in the record by counsel for the defendant in error that West was engaged in interstate commerce at the time of the injury in the following words:

"* * * we will admit that he (referring to West) handled express and baggage matter between local points in each State and also between points in one State and points in another State" (Appendix, p. 176).

As further indicating that this case was being tried on the theory that West was an employe of the Railway Company, and that the case was controlled entirely by the Federal Employers' Liability Act, brief extracts from the testimony of Charles R. Daigh, conductor on the freight train involved in this collision, who was placed upon the stand by the defendant in error and also by the Railway Company, and G. H. Bowers, general baggage agent for the Railway Company, who was placed upon the stand by the Railway Company, will be here referred to.

Mr. Daigh, after having testified on behalf of the defendant in error, was recalled by the Railway Company and testified in part as follows:

"Q. Mr. Daigh, your train was going from Muskogee to what point?

"A. Parsons, Kansas.

“Q. State whether or not you were carrying loads from Muskogee to Parsons, Kansas, or other points beyond there.

“Mr. Taylor: That is objected to on the grounds that fact as respect to both trains has been admitted.

“By the Court: Objection overruled; let him answer.

“Mr. Taylor: The plaintiff excepts.

“(Question read by stenographer.)

“A. Yes, sir (Appendix, pp. 181-182).

Mr. Bowers testified in part as follows:

“Q. Do you know whether or not Mr. West was handling any baggage for the M., K. & T. on that road that day?

“A. Yes, sir.

“Q. Do you know whether he had any baggage that was destined from some point in one State to a point in another State—that is, baggage that passed over the State line?

“A. He had baggage for Chetopa, Kansas, to Broken Arrow, Oklahoma. He had baggage from New York to Dallas, Texas, some ten or twelve pieces. I recollect one lot of two pieces from Shreveport, Illinois, to Muskogee, Oklahoma.

Cross-Examination, by Mr. Taylor.

“Q. Did he also have baggage between local points in Oklahoma?

“A. I think he had some in Vinita. I got records from the agents of what they shipped on that train.

“Q. Did he also have baggage from local points in Kansas?

“A. I didn't look that up. I only looked up the baggage he received after he left Parsons.

“Q. I mean did he carry baggage between local points?

“A. That train usually did” (Appendix, p. 83).

If it is not shown by this testimony and these proceedings that West was an employe of the Railway Company engaged in interstate commerce, it is not seen how such facts can be made to appear in a court record.

V.

THE INSTRUCTIONS GIVEN BY THE TRIAL COURT AND APPROVED BY THE STATE SUPREME COURT TOUCHING THE MEASURE OF DAMAGES ARE ERRONEOUS AND THE PLAINTIFFS IN ERROR BY SUCH INSTRUCTIONS ARE DENIED RIGHTS GUARANTEED UNDER THE FEDERAL CONSTITUTION.

Upon the question of the measure of damages, the plaintiff in error requested the Court to give its requested instruction numbered seven, which reads as follows:

“If you should find for the plaintiff your verdict should be for such amount as would compensate the plaintiff for the financial loss sustained, and you are not to permit your sympathy to influence your verdict. **The plaintiff is not entitled to recover for loss of the society of deceased nor for mental anguish.** Your verdict must be based upon the financial loss in dollars and cents.” (Appendix, p. 185.)

This instruction the Court declined to give as requested, but modified it and gave its instruction, which

is numbered six. The plaintiff in error excepted to the ruling of the Court, declining to give its instruction as requested, and also excepted to the ruling of the Court in giving its instruction numbered six.

Instruction number six given by the Court is as follows:

“If you find for the plaintiff in this case, then in assessing the damages which she is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased, and, determining this, you may consider the probable earnings of the deceased, his age, experience, habits, health, and bodily qualifications, during what probably would have been his lifetime, if he had not been killed, so far as these matters have been shown by the evidence; but the amount you allow cannot exceed the sum mentioned in the plaintiff’s petition.”
(Appendix, p. 190.)

It will be observed that the instruction as given to the jury is deficient in two important particulars, to which the attention of the Court was directed in requested instruction numbered seven, namely, that the plaintiff was not entitled to recover for the loss of the society of the deceased, and that she was not entitled to recover for mental anguish. It will also be noted that requested instruction number seven specifically tells the jury that it must not let its sympathy influence its verdict. This is extremely important in cases of this character, where jurymen are so prone to override the facts in the case and to allow their feelings for the bereaved widow to control their judgment.

It was prejudicial error for the Court to decline to give the instruction requested by the plaintiff in error

and also to decline to give any instruction telling the jury that there could be no recovery on account of the loss of society or on account of mental anguish, because there can be no recovery on account of these items of damage under the Federal statute.

This Court has very recently passed upon the point presented in this requested instruction and in the instruction as given by the trial court and under these opinions it was clearly error to decline to give the requested instruction.

In the very recent opinion of this Court in **Michigan Central R. R. Co. v. Vreeland**, 227 U. S. 59, Mr. Justice Lurton, delivering the opinion of the Court, said:

“The distinguishing features of that act are identical with the Act of Congress of 1908 before its amendment: First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries.

“The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance, or support of which they have been deprived. **Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings.** *Tiffany*, Death by Wrongful Act, Secs. 153, 154; **Illinois C. R. Co. v. Barron**, 5 Wall. 90, 105, 106, 18 L. Ed. 591, 594, 595; **Davis v. Guarnieri**, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350; **Blake v. Midland R. Co.**, 18 Q. B. 93, 21 L. Q. B. N. S. 233, 16 Jur. 562; **Hurst v. Detroit City R. Co.**, 84 Mich. 539, 545,

48 N. W. 44; **Munro v. Pacific Coast Dredging & Reclamation Co.**, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303.

"The word 'pecuniary' did not appear in Lord Campbell's Act, nor does it appear in our Act of 1908. But the former act, and all those which follow it, have been continuously interpreted as providing only for pecuniary loss or damage.

"A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially; 'not only to express the character of that loss to the beneficial plaintiffs which is the foundation of their right to recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative, upon which, in the nature of things, it is not possible to set a pecuniary valuation.' Patterson, Railway Acci. Law, Sec. 401."

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"Neither 'care' nor 'advice', as used by the court below, can be regarded as synonymous with 'support' and 'maintenance', for the Court said it was a deprivation to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate, his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements 'care and advice'. But there was neither allegation nor evidence of such loss of service, care or advice; and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such 'care and advice from their own experiences as men'. These experiences, which were to be the standard, would, of course, be as various as their

tastes, habits and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband." (Bold-face type ours.)

In **American R. R. Co. of Porto Rico v. Dedricksen**, 227 U. S. 145, Mr. Justice Lurton, delivering the opinion of the Court, said:

"There was error in the rule for measuring the damages recoverable.

"The cause of action which was created in behalf of the injured employe did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employe from his injury, creates a new and distinct right of action for the benefit of the dependent relative named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe. **The damage is limited strictly to the financial loss thus sustained. The court below went beyond this limitation by charging the injury that they might, in estimating the damages, 'take into consideration the fact that they are the father and mother of deceased, and the fact that they are deprived of his society and any care and consideration he might take of them, or have for them during his life.'** (5 Porto Rico Fed. Rep. 408.)" (Bold-face type ours.)

In **G. C. & S. F. Ry. Co. v. McGinnis**, 228 U. S. 173, Mr. Justice Lurton, delivering the opinion of the Court, said:

"The Court of Civil Appeals upheld this ruling, saying that the Federal 'statute expressly author-

ized the suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him, or had the right to expect any pecuniary assistance from him'. 147 S. W. 1189.

“This construction of the character of the statutory liability imposed by the Act of Congress was erroneous. In a series of cases lately decided by this Court, the act in this aspect has been construed as intended **only to compensate the surviving relatives of such a deceased employe for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given.** The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss.”

It will be observed from these opinions that there can be no recovery except for the financial loss sustained; this is such loss as can be measured by a money standard, and that there can be no recovery for loss of society or for mental anguish.

VI.

THE AMOUNT OF DAMAGES AWARDED IN THIS CASE IS EXCESSIVE UNDER THE DECISIONS OF THIS COURT DEFINING WHAT ELEMENTS OF DAMAGE CAN BE RECOVERED FOR IN A SUIT FOR DEATH UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

It has heretofore been shown that error was committed by the trial court and not corrected by the State Supreme Court in declining to instruct the jury that

no recovery could be had on account of loss of society or mental anguish.

This error doubtless is in part responsible for the excessively large verdict which was rendered. The testimony does not justify a recovery in the sum of \$15,000.00. Under the testimony such an amount could not properly be awarded.

The question of the amount which can be recovered in death cases under the Federal statute is controlled entirely by the provisions of that statute. A Federal question is here presented proper for review by this Court.

The amount of damages in this case is susceptible of computation with a reasonable degree of accuracy. The deceased was earning at the time of his death eighty-three and one-third dollars per month, or one thousand dollars per year. He had no other means of income and the testimony shows that from this amount he deducted his personal expenses while upon the road which his widow states was from three to five dollars per month. Of course, in addition to this he had other expenses, such as wearing apparel and incidental expenses and his actual living expenses which would come out of his salary and the probable result was that his wife and children received the net benefit of about one-half of his salary. His life expectancy was shown to be 29.62 years. It is true that under this computation and all things being favorable the deceased would have earned for the benefit of his family about fifteen thousand dollars during his probable life, had he lived and worked every day of his life expectancy, which, of course, cannot be assumed, but this is not the criterion for determining the measure of damages. There are too many possibilities and hazards in the life of per-

sons to say as a matter of fact that they will live for any given length of time or that their earning capacity will remain the same for any such length of time. In this case the evidence of A. L. Bird, Superintendent of the American Express Company, who was the superior officer of the deceased, and who knew the deceased's qualifications in the line of his employment and his opportunities and capabilities of promotion stated that the deceased had advanced just as high as he could and that there was no possibility of his obtaining a better position with the company. Mr. Bird further stated that the fact that the deceased earned more as an express messenger than he had in his previous employment in the office of the express company was no indication of an advancement, but was merely a change of work and that it was no indication of ability that he got more as a messenger than he did as a clerk in the office. This was naturally true and the difference in the salary of the two positions is doubtless on account of the hazard and risk which a messenger assumes by being continually upon trains and in danger of accidents such as this one.

The defendant in error could lend out the amount of this verdict at six per cent interest and would obtain therefrom nine hundred dollars a year all her lifetime. This amount is practically double the amount that her husband was contributing to the support of the family. In other words, under this verdict the widow and children would have from year to year about double what their husband and father would have contributed under the most favorable conditions and would at the close of their lives have fifteen thousand dollars or the amount of the verdict in addition thereto. It is evident the jury found damages beyond that which would

under the proper rules of law compensate them for the loss of the deceased and must have acted under feeling of sympathy for the widow and her fatherless children. While the law says there can be no recovery for this character of loss a jury oftentimes will allow their feelings to override the instructions of the Court and will allow excessive damages. This they should not do, and when they have done so, as is apparent in this case, it then became the duty of the trial court, and upon its failure, of the Appellate Court, to correct its error. This is not a case where it can be said that the jury and the trial court heard and saw the witness and therefore had a better means of judging the truth of the testimony. The testimony stands admitted and is reduced to a simple matter of calculation.

In the case of **Western Union Telegraph v. McGill** (Circuit Court of Appeals, Eighth Circuit), 57 Fed. 699, 701, it is said:

“The damages given by these statutes are not given in satisfaction of the wrong done, but are intended as a compensation to the persons for whose benefit the recovery is permitted for the pecuniary losses they have sustained by the death. They must be measured by these losses. There can be no recovery for the injuries or suffering of the deceased, or for the anxiety, sorrow or bereavement of those who survive.”

In the case of **Voelker v. Chicago, M. & St. P. Ry. Co.** (Circuit Court, N. D. Iowa, 1902), 116 Fed. 867, the testimony as to the pecuniary loss sustained was somewhat similar to the testimony in the case at bar. The jury in this case awarded a verdict of nine thousand dollars and it was urged that this amount was

excessive. While the Court did not set aside the verdict it indicated very clearly in its opinion the jury had awarded all that it should have awarded. District Judge Shiras said:

“It is finally urged that the amount of damages awarded is excessive, and is not sustained by the evidence. It was shown that the deceased was 29 years of age at the date of his death, and his expectancy of life was 35 years; that deceased was sober, industrious, and of good habits, and was earning from \$75 to \$78 per month. At the former figure he was earning \$900 per year, which rate of earning, continued for 35 years, would make the aggregate sum of \$31,500. The jury awarded as damages the sum he would have earned in ten years, and the Court cannot say that this sum is excessive. It is a liberal allowance, but not so excessive as to justify the Court in reducing the same.”

In **Baker v. Philadelphia & R. Ry. Co.** (Circuit Court, E. D. Pennsylvania, 1907), 149 Fed. 882, 887, a verdict of \$7,500 was sustained by the Court under some misgiving, but it is apparent from the opinion that a verdict in excess of that amount would not have been sustained. District Judge Holland said:

“There is a further objection that the amount is excessive. Henry K. Baker was not more than 25 years of age, in good health, good habits, industrious, and an esteemed and valuable employee. He was earning from \$100 to \$130 per month, most of which he gave to his mother, as he was thrifty and careful in matters of expenditure. Her income, therefore, was very close to \$1,000 per year. She was about 54 years of age, and while it could not be affirmed that her income from this source

would continue for the remainder of her life, yet this was her only source of maintenance, and from the disposition and habits of the young man the jury had a right to assess an amount equal to the value of his life to her in the way of income, based upon what he was giving her at this time, as modified by what he would continue to contribute during the entire period of her probable existence. There is no rule by which we can arrive with any certainty at a sum to exactly compensate one damaged in the loss of a son, as the plaintiff in this case is, and there is no doubt a wide difference of opinion as to what is and what is not excessive. This verdict of \$7,500, in my judgment, is not so obviously excessive as to require the Court either to grant a new trial or to interfere with the amount awarded."

As an instance of a verdict which was held excessive under facts somewhat similar to those in the case at bar, in the case of **St. Louis, I. M. & S. Ry. Co. v. Carraway** (Arkansas), 91 S. W. 749, 752, it is said:

"But it is contended that the verdict of \$8,000 on the other branch of the case is excessive. The evidence establishes the earning capacity of deceased at about \$75 per month, but it fails to show what amount he contributed to the support of his family. His widow, the only witness who testified upon the subject, was repeatedly asked on direct examination and cross-examination to state the amount of such contribution; but she could give little information on the subject. The only statement she gave concerning the amount of such contributions sufficiently definite to rest an estimate of damages upon was that while they lived at Alicia, Ark., he paid the grocery bills, house rent and clothing for herself and child, \$18 per month.

She testified in general terms that he furnished a support for herself and child, but did not state the amount contributed. It is certain from the proof that he contributed more than \$18 per month, but there is no means of ascertaining from the proof what amount he did contribute. The jury were not warranted in supplying the deficiency in the proof from their personal knowledge of the probable cost of supporting the family, especially where it fails to show even the style of circumstances in which they lived. There was some proof tending to show that his habits and character were such that his care and moral training of his child were of some value, and, under the rule, **State in Railway v. Sweet**, 60 Ark. 550, 31 S. W. 571, the jury were warranted in assessing some amount of damage on that score, but the evidence here does not authorize a large amount. Taking the proof in the record we have no hesitancy in saying that the verdict is excessive. The liability of appellant being established by the verdict upon instruction free from error and evidence sufficient in support, it remains only for us to fix the minimum amount of recovery which we think the jury should have assessed under the evidence, and require appellee to remit the judgment down to the proper amount or suffer a new trial.

“We think that the judgment is excessive to the extent of \$3000, and if appellee will, within 15 days, remit that amount the judgment will be affirmed for the remainder; otherwise it will be reversed, and the cause remanded for a new trial.”

In **Cheatham v. Red River Line** (District Court, E. D. Louisiana, 1893), 56 Fed. 248, 250, District Judge Billings said:

“The only facts which characterize the loss of the children who bring this suit are these: The

children are respectively 6 months, $2\frac{1}{2}$ and 5 years old; the father was aged 38 years; was earning the wages of a deck hand. He had been in the habit of devoting all his wages to the support of his children; to pay for their subsistence and rent, per month, \$16.50, besides providing for their clothes:

“In case of the damages resulting from the death of a person, the law of Louisiana contains no limit as to the amount of damage. This is true of the law of some of the other States. But in the law of many of the States the amount is limited to the sum of \$5000. The only act of Congress which authorizes a recovery in case of death fixes the limit of damages at \$5000. The fact of this frequent limit has great weight with me, it is so purely problematic how long the most productive life will continue so. According to Solomon, ‘the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favor to men of skill, but time and chance happeneth to them all’, not alone so far as the length of days is concerned, but so far as concerns a continuance of a capacity and disposition to earn or make money. The fluctuations in business, and its opportunities; the liability to form bad habits; the development of disease which, without ending life, may make its possessor incapable of earning money; the uncertainty which there must be as to the continuance of physical capacity, and the mental and moral purposes requisite for the earning of wages, as well as that as to the existence and continuance of the necessary external conditions, all these elements make the problem of how long a man’s productive life shall be estimated to be one of the greatest uncertainty. There are no tables of productive lives. It is human ex-

perience that some lives are almost worthless to those dependent upon them, and some which are, and which promise to be, support and comfort, come to produce nothing but shame and sorrow. In fixing the value of a human life, and in trying to be just alike to the injured and the injurer, no chimerical estimate should be made, but rather should there be a resort to sober judgment. In view of these considerations, I think the damages which the children have suffered by reason of their father's death should be fixed at \$2500."

VII.

IT WAS ERROR TO INSTRUCT THE JURY THAT THREE-FOURTHS OF THEIR NUMBER COULD RETURN A VERDICT AND PLAINTIFFS IN ERROR BY SUCH INSTRUCTION ARE DENIED RIGHTS GUARANTEED UNDER THE FEDERAL CONSTITUTION.

As this cause of action is controlled by a statute of the United States enacted by Congress in pursuance of a power given to it under the commerce clause of the Federal Constitution and is entirely independent of all State legislation, all the rights which either party to this suit may have must be determined under the Federal Constitution and the act of Congress. Under the Federal Constitution the defendant is entitled to a jury of twelve persons and to the unanimous verdict of that jury. This is a matter of substantive right which cannot be denied to it, in any proceeding where rights under the Federal Constitution are involved. The State Constitution permitting the three-fourth verdict has no application whatever in a suit of this character. This Act of Congress is general and uniform in its application over all the territory coming

under its terms, and the question of liability or non-liability should depend upon the Act and not upon the forum.

The right to the unanimous verdict must apply in all cases brought under this Federal Employers' Liability Act regardless of the tribunal in which the case may be tried. There were three cases growing out of the same accident and based upon the same law, the Emery case, the Lenahan case and the West case. The West case is the one now under consideration. The Lenahan case has heretofore been referred to in this brief. The injustice of applying one rule to the one case and one to the other can be readily seen, when, if the Lenahan case had been brought in the Circuit Court of the United States for the Western District of the State of Oklahoma, the rule of the unanimous verdict would necessarily have been applied to it and if the West case had been brought as it was in the State District Court for Muskogee County the Court applied the rule as to the three-fourth verdict. Now the rights of these men were identical, the same being based upon the Constitution and statutes of the United States and not upon the Constitution or statutes of the State of Oklahoma. It will not do to say that the heirs of these two deceased persons could change the right of the Railway Company as to the trials in these cases by seeking different tribunals in which to enforce their cause of action.

The same rules should apply in every court where an action under this act is maintainable and this is certainly true when in the courts of some States three-fourths of a jury may return a verdict and in the courts of other States and in all the United States courts a unanimous verdict of twelve jurymen is required.

In the case of the **St. Louis, I. M. & S. Ry. Co. v. Taylor**, 210 U. S. 281, heretofore referred to, the construction of the Safety Appliance Act of 1893 was under consideration, and the principle that there should be a uniform construction of the act regardless of the forum in which the question might arise was considered. There can be no uniform application of a Federal statute when in some jurisdictions there must be a unanimous verdict of the jury, and in other jurisdictions three-fourths of the jury may return a verdict. In the **Taylor case**, *supra*, the Court said (page 293):

"The plain reason is that in all such cases he has claimed in the State court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union." (Bold-face type ours.)

The instruction assigned as error is number 7 of the instructions given by the Court and reads as follow

"Nine of the jury concurring is sufficient to return a verdict for plaintiff or defendant, and if the verdict is rendered by nine or more, but by less than the whole number of jurors, then the jurors who concur in the verdict must sign their names thereto. If the verdict is concurred in by the entire jury, then you will select some one of your number foreman and have him sign the verdict as such foreman and return it into court" (Appendix, p. 190).

It is true that the verdict in this case was signed by the foreman alone, but this does not necessarily indicate that the verdict would have been unanimous if the instruction complained of had not been given. It is impossible to tell what operated upon the minds of the jury to cause unanimous acquiescence in the verdict. It is very probable that if nine of the jurymen or any less than twelve reached the conclusion indicated by the verdict that the remaining jurymen, knowing that it was useless to contend against the conclusion of the larger number of the jurymen, which the Court advised them was final, acquiesced in the verdict. The plaintiff in error was entitled not only to a unanimous verdict in form but to a unanimous verdict in fact, and it could not obtain such a verdict under the instruction which was given by the trial court. It was prejudiced in its rights just as much as if three-fourths of the jury had returned the verdict.

The general proposition that in trials in the State courts where Federal rights are involved such courts must reserve those rights if found in the case of **Robb v. Connolly**, 111 U. S. 624, 28 L. Ed. 542, 546, Mr. Justice Harlan, delivering the opinion of the Court, says:

“Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for, the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it and the laws of the United States made in pursuance thereof and all treaties made under their authority, as the supreme law of the land, ‘anything in the Constitu-

tion or laws of any State to the contrary notwithstanding'. If they fail therein and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided, to this Court for final and conclusive determination."

The question whether less than a unanimous verdict could be returned, the Seventh Amendment to the Constitution of the United States provides as follows:

"In suits at common law where the value in controversy shall exceed \$20 the right of trial by a jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The question whether the majority verdict was in conflict with the constitutional provision came before this Court in the case of **American Publishing Company v. Fisher**, 166 U. S. 464, 41 L. Ed. 1079, 1081. This case arose in the territory of Utah and a statute had been enacted in that territory authorizing such a verdict. Mr. Justice Brewer, delivering the opinion of the Court, says:

"But if the Seventh Amendment does not operate in and of itself to invalidate this territorial statute, then Congress has full control over the territories irrespective of any express constitutional limitations, and it has legislated in respect to this matter. In the first place in the act to establish a territorial government for Utah, Act of Sept. 9, 1850 (9 Stat. at L. 458, Chap. 51, Para. 17) it enacted 'that the Constitution and laws of

the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same, or any provision thereof, may be applicable'. A subsequent statute has more specific reference to jury trials. April 7, 1874 (18 Stat. at L. 27, Chap. 80). The first section of this act, after confirming the statutes of the various territories so far as they authorize a uniform course of proceeding in all cases, whether legal or equitable, closes with this proviso: 'Provided, that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law'. This, of course, implies not merely that the form of a jury trial be preserved, but also all its substantial elements.

"Therefore, either the Seventh Amendment to the Constitution, or these Acts of Congress, or all together, secured to every litigant in a common law action in the courts of the Territory of Utah the right to trial by jury, and nullified any act of its Legislature which attempted to take from him anything which is of the substance of that right. Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any more details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right. It follows, therefore, that the Court erred in receiving a verdict returned by only nine jurors, the others not concurring."

The Court in the case last cited states that the question of the power of the State to alter the rule in respect to unanimity of juries is not before it for consideration, nor is it necessary in this brief to question that power in so far as purely State matters are

concerned, but where rights are deprived under the Federal Constitution, and not under the State Constitution or laws it is immaterial what rule the State may have laid down with reference thereto. In other matters it certainly has not the power to alter the Constitution of the United States. When it is by the machinery of its courts seeking to enforce rights derived under that Constitution it cannot in the same action deny rights guaranteed in the same Constitution. In so far as the Federal law under consideration in this case is concerned the State stands in just the same relation to the United States as would the Territory of Utah in the case cited. The Federal Acts superseded in their entirety all State laws in the same manner that the Supreme Court held in **Gutierrez case** (215 U. S. 87), that the Act of June 11, 1907, superseded all laws in the territory in conflict therewith.

In the case of **Thompson v. Utah**, 107 U. S. 343, 42 L. Ed. 1061, the plaintiff in error, Thompson, was indicted for grand larceny alleged to have been committed while Utah was a territory and at the time of the alleged offense was entitled to a trial by a jury of twelve men and a unanimous verdict. It appears that he had been tried once and convicted during the territorial days, and the case remanded for a new trial. When the case was again tried the state laws were in operation, and under those laws a trial of such an offense could be had before a jury of eight men, and Thompson was tried by such a jury. Mr. Justice Harlan, delivering the opinion of the Court, said:

“Was it then competent for the State of Utah, upon its admission into the Union, to do in respect of Thompson’s crime what the United States could

not have done while Utah was a territory, namely, to provide for his trial by a jury of eight persons?

“We are of opinion that the state did not acquire upon its admission into the Union the power to provide, in respect of felonies committed within its limits while it was a territory, that they should be tried otherwise than by a jury such as is provided by the Constitution of the United States. When Thompson’s crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a state could deprive him of his liberty by the concurrent action of a court and eight jurors would recognize the power of the state, not only to do what the United States in respect of Thompson’s crime could not, at any time, have done by legislation, but to take from the accused a substantial right belonging to him when the offense was committed.”

The Court further said:

“Now, Thompson’s crime, when committed, was punishable by the Territory of Utah proceeding in all its legislation under the sanction of, and in subordination to the authority of the United States. The court below substituted, as a basis of judgment and sentence to imprisonment in the penitentiary, the unanimous verdict of eight jurors, in place of a unanimous verdict of twelve. It cannot therefore be said that the Constitution of Utah, when applied to Thompson’s case, did not deprive him of a substantial right involved in his liberty, and did not materially alter the situation to his disadvantage. If, in respect to felonies committed in Utah while it was a territory, it was competent for the state to prescribe a jury of eight persons, it could just as well have prescribed a jury of four or

two, and perhaps, have dispensed altogether with a jury, and provided for a trial before a single judge."

In **Capital Traction Co. v. Hof**, 174 U. S. 1, 48 L. Ed. 873, the question of the right to a jury trial in the District of Columbia under the rules of the common law as provided by the Constitution of the United States was before the court for consideration. Mr. Justice Bray, delivering the opinion of the Court, said:

"The Congress of the United States, being empowered by the Constitution 'to exercise exclusive legislation in all cases whatsoever' over the seat of the national government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise with the district all legislative powers that the legislature of a state might exercise within the state; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States.

"It is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia."

In the case of **Rasmussen v. United States**, 197 U. S. 516, 49 L. Ed. 862, the question of the right of the Territory of Alaska to provide that in trials for misdemeanors in Alaska six jurors shall constitute a regular jury was before the court for consideration. It was contended that this legislation of Alaska was repugnant to the 6th Amendment to the Constitution of the

United States, which amendment, is analogous to the 7th Amendment, the difference being that the 6th Amendment deals with criminal prosecutions and the 7th Amendment deals with civil suits. Mr. Justice White, delivering the opinion of the court, after reviewing the decisions hereinabove quoted and others construing the 7th Amendment, said:

“As it conclusively results from the foregoing consideration that the 6th Amendment to the Constitution was applicable to Alaska, and as of course, being applicable, it was controlling upon Congress in legislating for Alaska, it follows that the provision of the Act of Congress under consideration, depriving persons accused of a misdemeanor in Alaska of a right to trial by a common law jury, was repugnant to the constitution was void. Having disposed of the constitutional question, we deem it unnecessary to review the other alleged errors.”

The Constitution of the United States is the supreme law of the land in so far as its provisions extend and the state has no greater right to enforce its legislation when it comes in direct conflict with the Federal Constitution than the Territory of Alaska had in the case above cited.

A similar question was presented in the case of the **United States v. Haskell et al.** (District Court, E. D., Okla.), 169 Fed. 449. In that case the accused were indicted by a grand jury of more than sixteen men. The offense was alleged to have been committed in the former Indian Territory and at the time of the alleged committing of the offense the grand jury could not exceed sixteen persons. Under the law providing for the sixteen grand jurymen five dissenting votes could have

precluded the finding of the indictment, while under the grand jury as constituted, it required not less than ten dissenting votes to have the same effect. It was held that this altered the situation to the disadvantage of the defendants. Judge Marshall, delivering the opinion of the Court, said:

“But it is argued that this is mere matter of procedure and that one accused of crime has no vested right in being prosecuted in accordance with the methods of procedure in force at the date of the offense. That must be granted as a general proposition; but it is so because a change of procedure ordinarily imposes no hardship on the accused, nor seriously alters his position to his disadvantage. * * *

“Here, though the change was one of procedure, I am of the opinion that a substantial protection designed by the law for the benefit of the accused was subsequent to the commission of the offenses if not dispensed with, so impaired as to injuriously affect the rights of the accused, and alter the situation to their disadvantage, so that as to them it must be held to be *ex post facto*.”

VIII.

THERE IS NO MERIT IN THE MOTION TO AFFIRM.

Counsel for defendant in error concede in their brief that no showing has been made by them which would authorize this Court to affirm the judgment upon motion. There is a faint suggestion in their argument that the grounds of this appeal are frivolous and that it was taken for delay only. It is believed that an examination of their own brief without reference to this brief is sufficient refutation to any such contention.

The questions presented in this case are of the gravest importance and some of them have never directly received the consideration of this Court as far as its opinions disclose.

It cannot be fairly stated that these plaintiffs in error are guilty of delay in praying this Court for a correction of the errors herein set out and for a reversal of the judgment in this cause on account of the denial of rights guaranteed to them under the Constitution and laws of the United States when the record so clearly shows that these rights have been denied to them.

CONCLUSION.

At whatever angle this case may be viewed there was error of the trial court and the State Supreme Court which demands a reversal of the case. If West was an employe of the Railway Company the present plaintiff cannot under any circumstances recover. If it be contended he was not an employe of the railway company under the issues and proof in the case, the railway company is entitled to have the question determined as a question of fact by the jury and this right was denied it.

If it should be contended that the deceased, West, was not an employe of the railway company and the railway company did not occupy towards him the relation of master, the petition does not state a cause of action because it does not show any right of the deceased to be upon the train. The allegations of the petition that he was an express messenger do not show a right to be upon the train.

The contracts between the railway company and the express company and the written instructions from

officers of the express company to the deceased would show the right of the deceased to have been upon this train as an express messenger but at the same time that would also show that he was upon the train as a joint employe of the express company and the railway company, acting as baggageman for the railway alone, but these contracts and notice were not admitted as evidence in the case in the trial court because of the objection of the attorneys for the defendant in error and this very action of theirs prevented the proof from going in this record which would show the right of the deceased to be upon the train as express messenger and the error of the trial court in refusing to admit these contracts and this notice is one of the propositions upon which this case has been submitted to this court.

Unless, therefore, it be conceded that the pleadings of the defendant in error show the deceased to have been the joint employe of the express company and the railway company, acting as express messenger on the one hand for the express company and as baggageman for the railway company on the other hand, and the concession of these propositions by the answer of the railway company, then there is nothing in the case to show the deceased as having occupied any relation to the railway company upon which his widow or representative or others might base a damage suit against the railway company.

The theory must be accepted that the pleadings of the defendant in error make a case wherein the deceased was the employe of the railway company on this train as well as the employe of the express company, or this case should be reversed because there is nothing in the record that shows any right upon the part of the deceased to have been on this train at all.

There was prejudicial error in the giving of the in-

struction by the trial court on the measure of damages and in declining to give the instruction upon that question requested by the plaintiff in error. This was error whether West was an employe of the railway company or not. Neither under the state statute nor under the federal statute would the proper plaintiff in this suit be entitled to recover any damages for the loss of the society of the deceased or for mental anguish.

The rights insisted upon by this plaintiff in error are rights given it under the constitution and laws of the United States and particularly under the Federal Employers' Liability Act and under this record the federal questions here presented cannot be fairly avoided.

For these reasons it is submitted that the Court should overrule both the motion to dismiss and the motion to affirm so that the entire record may be printed and the parties given proper opportunity to fully brief and argue the merits of the questions in issue, in that regular and orderly course as benefits their importance as provided by the general rule of this Court.

Respectfully submitted,

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